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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9086.

LIBERTY MUTUAL INSURANCE COMPANY,
a Corporation, et al., *Appellants*,

v.

FRANK A. CARDILLO, Deputy Commissioner, U. S. Employees' Compensation Commission, et al., *Appellees*.

Appeal from the District Court of the United States for the District of Columbia.

JOINT APPENDIX.

I.

PLEADINGS, DOCKET ENTRIES AND OTHER PAPERS.

Filed Dec 13 1944

In the District Court of the United States for the District of Columbia

Civil Action 25249.

LIBERTY MUTUAL INSURANCE COMPANY, a corporation, 1909 Massachusetts Avenue, N. W., Washington, D. C., and E. C. ERNST, INC., a corporation, 1622 Fourteenth Street, N. W., Washington, D. C., *Plaintiffs*,

v.

FRANK A. CARDILLO, Deputy Commissioner, U. S. Employees' Compensation Commission, Washington, D. C., and VIRGINIA C. TICER, 317 Tennessee Avenue, N. E., Washington, D. C., *Defendants*.

Amended Bill of Complaint for Mandatory Injunction Under a Compensation Award.

To the Honorable Justices of the District Court of the United States for the District of Columbia, Holding an Equity Court:

The bill of complaint of the Liberty Mutual Insurance Company, a corporation, and E. C. Ernst, Inc., a corporation, through their attorneys, respectfully shows unto this Honorable Court:

1. That the Jurisdiction of the Court is based upon Title 33, U. S. Code, Sec. 921, and Title 36, District of Columbia Code, 1940 ed., Sec. 501.

2. That the plaintiff, Liberty Mutual Insurance Company, a corporation, is a duly organized company doing

business in the District of Columbia and brings this suit in its own right as compensation insurance carrier for plaintiff E. C. Ernst, Inc., as more fully hereinafter appears. Plaintiff E. C. Ernst, Inc., a corporation, is an electrical contractor with an office in the District of Columbia but doing the major part of its business elsewhere. It brings this suit in its own right as employer of Clarence H. Ticer, Jr., its deceased employee.

2 3. Defendant Frank A. Cardillo is Deputy Commissioner of the U. S. Employees' Compensation Commission, and is sued in his official capacity; defendant Virginia C. Ticer is a citizen of the United States and a resident of the District of Columbia, and the surviving widow of said Clarence H. Ticer, Jr.

4. A copy of the award of said Frank A. Cardillo, Deputy Commissioner, is attached hereto to be read as a part hereof. The transcript of the testimony adduced at the hearing is also made a part of this complaint.

5. That on December 13, 1943, Clarence H. Ticer, Jr. was driving northward along U. S. Route No. 1, returning to the District of Columbia after his day's work had been completed upon the Marine Base in Quantico, Virginia. He had been employed upon that project since Novembr of 1940. He was driving in his own automobile and bringing several fellow employees back to the Virginia-District of Columbia line. While nearing the main entrance to Fort Belvoir, Virginia, a large stone flew through the windshield of his car and struck him on the left side of the head, crushing his skull and causing such a severe injury that Ticer died four days later, December 17, 1943.

6. That thereafter defendant Virginia C. Ticer made a claim for compensation as the surviving widow under provisions of the Act of Congress approved May 17, 1928 entitled: "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes." The employer and his carrier challenged the

application of this Act and the jurisdiction of the U. S. Employees' Compensation Commission; that it was shown by said employer and carrier, that Ticer had been engaged upon a major project in Virginia for a period of over three years; that during this time he reported daily to his work in Quantico and never at the Ernst Company's office in the District of Columbia; that all of the employment details, including the payment of salary, were consummated in the State of Virginia; that transportation was not supplied by the employer; that despite this evidence, and not in accordance with law, defendant Deputy Commissioner Cardillo in his award made the twenty-first day of July, 1944, found that the U. S. Employees' Compensation Commission had jurisdiction to determine the case.

3 7. That defendant Virginia C. Ticer claimed that the injury of her deceased husband arose out of and in the course of his employment, notwithstanding a showing that the injury occurred after Ticer had completed a day's work and sustained his injury while transporting several fellow employees to their homes in his own automobile, for which service he received payment; that said defendant Deputy Commissioner Cardillo in the award made the twenty-first day of July, 1944, found, without substantial evidence to support his conclusion, that the injury did arise out of and in the course of employment.

8. That said findings of fact and award followed a hearing before the Deputy Commissioner, at which hearing the substance of all of the facts hereinbefore related were clearly made known to the said Deputy Commissioner and made a part of his record of said hearing; that, in addition, it developed at said hearing that there was a contract in existence between the International Brotherhood of Electrical Workers, Local Union No. 26, and the Institute of Electrical Contractors, of which the plaintiff E. [illegible] Ernst, Inc. was a member, and that that contract provided among other things that "transportation and any necessary expenses, such as board and lodging, shall be furnished for

all work outside of the District of Columbia" (Rule 15, subparagraph (b)); that when a job is to be let the contractors call the Union and find out what additional compensation is to be paid to cover this provision of the contract by the contractor involved; that for many years employees working at Quantico, Virginia received $2.00 per day additional compensation; that it makes no difference where the prospective employee lives with relation to Quantico, the amount that he receives under this provision of the contract is the same whether he lives on the job, near the job, or a long distance from it; that the contract has no provision which determines what the employee shall do with the money that he receives under the aforesaid provisions of Rule 15(b) and that if he buys gasoline or anything else with that money that is the employee's own concern, and that if he doesn't use it for traveling expenses or is not required to use it for travelling expenses, he retains the money regardless; that the $2.00 paid to electrical workers at Quantico bore no direct relation to the amount expended by those employees in getting to and from the job; that it spite of such testimony said defendant Deputy Commissioner Cardillo in the award made on the twenty-first day of July, 1944, found "that the said transportation expense was paid in lieu of the employer supplying transportation."

4

9. That plaintiffs, in complying with said erroneous and illegal award, are paying to the defendant Virginia C. Ticer compensation at the rate of $13.12 per week and that your petitioners are without remedy save through the interposition of this Honorable Court.

WHEREFORE, the premises considered, your petitioners pray:

1. That the proceedings before said Deputy Commissioner be reviewed by this Honorable Court, including the record of evidence, and testimony taken at the formal hearing before him, together with the findings of fact and award.

2. That upon final hearing this Honorable Court may

enter a mandatory injunction permanently restraining said Frank A. Cardillo, Deputy Commissioner, and said Virginia C. Ticer, from enforcing payment of said award, and requiring defendant Frank A. Cardillo, Deputy Commissioner, to vacate and set aside said award and issue a new order denying compensation on the grounds which hereinbefore appear.

3. And for such other and further relief as to this Court may seem just and proper.

HOGAN & HARTSON

By Arthur J. Phelan,
Paul N. Shorb,
Attorneys for Plaintiffs
810 Colorado Building,
Washington, D. C.

Exhibit No. 1.

Filed Dec 13 1944

United States Employees' Compensation Commission
District of Columbia Compensation District

Compensation Order Award of Death Benefits
Case No. 991-78 Fatal

In the matter of the claim for compensation under the District of Columbia Workmen's Compensation Act
(Clarence H. Ticer, Jr., deceased employee)

MRS. VIRGINIA CATHERINE TICER, surviving wife, *Claimant*

v.

E. C. ERNST, INCORPORATED, *Employer*,

LIBERTY MUTUAL INSURANCE COMPANY, *Insurance Carrier*

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law, the Deputy Commissioner makes the following

Findings of Fact.

That on December 13, 1943, Clarence H. Ticer, Jr., hereinafter referred to as "employee", was in the employ of the employer above named, whose address is 1622-24 Fourteenth Street, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled "An act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia, and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Liberty Mutual Insurance Company; that on the said day the employee herein had performed services as an electrician subforeman for the employer at Quantico Marine Base, Quantico, Virginia; that after completing his work and while driving his automobile en route from his place of work to his home in the District of Columbia along U. S. Route No. 1, and as he approached Fort Belvoir, Virginia, a large stone, which came from under the rear wheel of a passing truck, crashed through the windshield of his car, struck him on the head, crushed his skull, and
6 caused his death on December 17, 1943; that written notice of death was given to the employer within thirty days; that the employer furnished the employee with medical treatment in accordance with the provisions of Section 7 (a) of the Act; that the average annual earnings of the employee at the time of the injury amounted to $5,500; that in addition to his regular wages the employee received $2 per day from the employer as transportation allowance; that on the date of the injury the employer was carrying on employment in the District of Columbia as an electrical contractor and was engaged in electrical construction work in the District of Columbia as well as in the surrounding areas, including Virginia; that it maintained an office at 1622 Fourteenth Street, Northwest, Washington, District of Columbia; that the employee herein was an employee of

such employer; that he resided at 2505 Thirteenth Street, Northwest, Washington, District of Columbia; that he was an electrician and he was engaged in electrical construction for the employer at the Quantico Marine Base, Virginia; that the employee was hired by the employer in the District of Columbia; that he was a regular employee and had worked steadily for the employer for a period of approximately nine years, with the exception of a period of approximately six months in the year 1938 or 1939 when he worked for the United States Government; that in the year 1940 the employee worked for the employer as an electrician on a construction project at the Navy Yard Administration Building, Washington, District of Columbia; that in November of the said year, while so employed, he was transferred by the employer to the job in Quantico, Virginia; that the employee's employment in Quantico continued until the date of the injury; that approximately three months after commencing his work at Quantico the employee was made subforeman; that there was in effect an agreement between the electrical workers' union and the employer that "transportation and any necessary expense, such as board and lodging, shall be furnished for all work outside the District of Columbia"; that the sum of $2 per day was fixed by the parties to the said agreement as transportation expense and represented the approximate cost of travel from Washington, District of Columbia, to the Marine Barracks at Quantico, Virginia, and return; that the said sum was paid to the employee as transportation expense by the employer in addition to the regular hourly rate of pay; that the said transportation expense was paid in lieu of the employer's supplying transportation; that because the job site at Quantico was several miles away from the bus or train terminal it was necessary for the employee and his coworkers to drive their own automobiles to and from work; that a car pool was formed which included the employee herein; that each morning the

workers started from their homes in their own automobiles to a designated meeting place at Roaches Run, Virginia, from which point they would proceed in one car to the job site in Quantico; that the workers alternated in the use of the cars for that part of the trip; that the employer was aware of such means of transportation used by its employees and acquiesced therein; that on December 13, 1943, at the time the injury occurred, four coworkers were riding with the employee in the latter's car; that two of the said workers were not members of the car pool; that each worker, including the employee herein, received $2 from the employer as transportation expense; that non-members of the car pool paid the car owner $1 each for the round trip; that at the time of the injury the employee was travelling on a direct route from his place of employment to his home in Washington, District of Columbia; that the injury arose out of and in the course of the employment; that a claim for death benefits has been filed by Virginia Catherine Ticer as surviving wife of the employee; that the claim is within the jurisdiction of the District of Columbia Workmen's Compensation Act, and that the employer is liable for the payment of death benefits; that at the time of his death the employee had gone through three different marriage ceremonies; that the employee's first marriage to one Alice L. Williams was dissolved by a decree of divorce entered on August 27, 1930, by the Circuit Court for St. Mary's County, Maryland; that prior to the said divorce the employee on April 5, 1930, went through a marriage ceremony with one Hilda I. Figella in Media, Pennsylvania; that the latter relationship was dissolved by decree of divorce entered on May 1, 1942, by the Circuit Court of Fairfax County, Virginia; that on June 14, 1942, the employee married Virginia Catherine Ticer, the claimant herein, at Dillon, South Carolina; that thereafter they lived together as man and wife in the District of Columbia until the time of his death; that at such time the claimant was the surviving wife of the employee

and she is entitled to death benefits at the maximum rate of $13.125 per week; that funeral expenses of the deceased employee amounted to $705.80; that the total amount of such bill has been paid by the claimant, and she is entitled to reimbursement in the sum of $200; that the accrued death benefits payable to the claimant from December 17, 1943, to July 20, 1944, inclusive, are $406.87 (31 weeks at the rate of $13.125 per week); that nothing has been paid as death benefits.

Upon the foregoing findings of fact, the Deputy Commissioner makes the following

Award.

That the employer, E. C. Ernst, Incorporated, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to Virginia Catherine Ticer, the claimant herein, death benefits as follows: 31 weeks at the rate of $13.125 per week, from December 17, 1943, to July 20, 1944, inclusive, amounting to $406.87, and shall continue payments thereafter in bi-weekly installments at the rate of $13.125 per week, subject to the limitations of the Act, or until otherwise ordered.

The employer and the insurance carrier shall also pay to the claimant the sum of $200 as funeral expenses.

A fee for legal services rendered the claimant in connection with this claim is approved in the sum of $200 in favor of Attorney Homer S. Carpenter, 1001 Fifteenth Street, Northwest, Washington, District of Columbia, same to be a lien upon and paid out of this award.

Given under my hand at Washington, D. C., this twenty-first day of July, 1944

(Sgd) FRANK A. CARDILLO
Deputy Commissioner
District of Columbia Compensation District

152 Filed Feb 19 1945

Motion to Dismiss Amended Complaint.

Now comes the defendant, Frank A. Cardillo, deputy commissioner, United States Employees' Compensation Commission, by his attorneys and moves this Honorable Court to dismiss the amended complaint for review of the compensation award filed herein for the following reasons:

1. That the amended complaint filed herein does not state a cause of action and does not entitle plaintiffs to any relief, nor does said amended complaint state a claim against defendant upon which relief can be granted.

2. That it appears from the amended complaint, including the transcripts of testimony taken before the deputy commissioner and made part of the complaint, that the findings of fact of the deputy commissioner in the compensation order filed by him on July 21, 1944, complained of in the complaint, are supported by evidence and under the law said findings of fact should be regarded as final and conclusive.

3. That the District of Columbia Workmen's Compensation Act of May 17, 1938 (D. C. Code (1940), title 36, chapt. 5, sec. 1) applies in respect to the injury of an em-

153 ployee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury occurs, and as shown by the record, and findings thereon, the injury of said Clarence H. Ticer is within the purview of said Act.

4. That it appears from the amended complaint, including the transcripts of testimony, that the compensation order filed by the deputy commissioner on July 21, 1944, complained of by plaintiffs, is in all respects in accordance with law.

5. For such other good and sufficient reasons as may be shown.

EDWARD M. CURRAN,
United States Attorney
By D. Burch
DANIEL B. MAHER,
Assistant United States Attorney,
Attorneys for defendant Cardillo.

154 Filed Feb 19 1945

Motion to Dismiss Amended Complaint.

Now comes the defendant, Virginia C. Ticer, by her attorney, and moves this Honorable Court to dismiss the amended complaint for the reasons and upon the authorities cited in Motion to Dismiss Amended Complaint filed herein on behalf of defendant, Frank A. Cardillo, Deputy Commissioner, which motion, together with supporting memorandum of points and authorities, is hereby adopted by defendant Virginia C. Ticer.

HOMER S. CARPENTER,
1001 15th St. N. W.
Washington, D. C.
Attorney for Virginia C. Ticer,
defendant.

155 Filed Jun 11 1945

Order Granting Motion to Dismiss Complaint.

This action came on to be heard upon the motion of the defendants to dismiss the amended complaint and it appearing that the findings of the deputy commissioner in the compensation order complained of, are supported by evidence in the record and that said compensation order is in

all respects in accordance with law, it is this 11th day of June, 1945,

Ordered, Adjudged and Decreed that the motion to dismiss said amended complaint is hereby granted and the amended complaint filed herein be, and the same hereby is, dismissed.

DANIEL W. O'DONOGHUE,
Justice.

No objection as to form:
HOGAN & HARTSON
by ARTHUR J. PHELAN
Attorneys for Plaintiffs

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

12 The Deputy Commissioner: On what ground is the claim controverted, Mr. Phelan?

Mr. Phelan: This claim is filed in the District of Columbia, and it is the contention of the carrier that this Commission has no jurisdiction over this claim. The accident happened in Virginia and the deceased employee had been working in Virginia for quite a period of time, and it is the position of the carrier that the Virginia Commission has jurisdiction.

Furthermore, as I understand it, this hearing is called solely for the purpose of determining the question of
13 jurisdiction. I don't know whether we should state our other grounds of controversion at this time.

The Deputy Commissioner: I think perhaps it would be better if you did.

Mr. Phelan: It is our contention, further, that this claim did not arise out of or in the course of employment; that this man was returning from his work at the time. He had finished his work at Quantico and was coming home from work with a car pool over which the employer had no control whatsoever.

That under the circumstances of the accident it didn't arise out of or in the course of his employment.

Our position further is that this claim would not be compensable under any circumstances under Virginia law, and we contend that the law of the place where the accident occurred should govern, irrespective of what the law in the District of Columbia might be.

Therefore, it is our position that even though you should find that this Commission has jurisdiction we still contend that under the facts and circumstances of this case that the accident did not arise out of or in the course of his employment within the purview of the Virginia decision, which we contend should govern in this case.

We further maintain that this widow is not a dependent widow within the meaning of the Act.

The Deputy Commissioner: It is not quite clear
14 to me as to what you mean by the application of the Virginia law. Even though we should find there is jurisdiction in the District of Columbia, the Virginia law should apply?

Mr. Phelan: Yes. In other words, it is the same thing, if the Court please, as to the question of negligence under the law. If an accident happens under circumstances that are recoverable in Virginia, it is the Virginia law that applies even though the suit is brought in the Courts of the District of Columbia.

. . . . . .

Our position is that despite the Compensation Act, it is the law of the place of the accident that should govern and should determine the question as to whether or not the accident arose out of or in the course of his employment.

. . . . . .

15 The Deputy Commissioner: Do your wish to make any statement in connection with the claim, as to what the contention of the claimant is?

Mr. Carpenter: It is the claimant's position that the jurisdiction of this matter is in the District of Columbia Workmen's Compensation Commission, pursuant to the provisions of the District of Columbia Code.

We deny that the law of the place of the accident would apply under these circumstances. If we are right in our contention that this Commission has jurisdiction, then this Commission must apply the appropriate statute under which it operates, and we believe it is a compensable injury.

Mr. Phelan: Our position with reference to that, if the Commissioner please, is that the procedural provisions of the District of Columbia Code would apply, but basically it must be the law of the place where the accident occurred that must govern.

Mr. Carpenter: I presume this could be handled more fully by brief, but I want to say this: That the Commission in this case has jurisdiction because the employer is a D. C. employer, conducting employment in the District of Columbia, and the employment of the deceased in this case arose in the District of Columbia.

16 The work site was in the State of Virginia, and the facts of the case as developed will show in addition to the wages paid to the deceased there was paid a stated sum each day for travelling expenses back and forth from the work site to his home in the District of Columbia.

The deceased and the claimant in this case are both residents of the District of Columbia, and the claimant still is. The statute governs the Commission and the provision of the statute must apply.

. . . . . .

17 **Clement F. Preller**

. . . . . .

By the Deputy Commissioner:

Q. State your full name. A. Clement F. Preller, 403 Eleventh Street, Northwest.

Direct Examination

By Mr. Carpenter:

Q. What is your position, Mr. Preller? A. I am business manager of the Electrical Workers Union

Q. What Electrical Workers Union is that? A. The Local known as Electrical Workers Local No. 26, International Brotherhood of Electrical Workers, which embraces Washington, Maryland, and Virginia.

Q. Where are the offices of the Union? A. 403 Eleventh Street, Northwest.

Q. What are your duties as business manager? A. Placing men on the job, seeing about labor relations on
18 the job, that there is proper relations between the contractor and the men, keeping down strikes and troubles on the job, and acting as a go between between the men and the contractor.

Q. Did you in the course of your duties have dealings with E. C. Ernst, Incorporated? A. Yes.

Q. What is the company? A. E. C. Ernst is an electrical concern here, who are in agreement with us, and we hire our men to the E. C. Ernst Company through an agreement.

Q. You say the E. C. Ernst Company is an electrical company here? A. In Washington; yes.

Q. You mean by that an office here? A. Yes; on Fourteenth Street, Northwest.

Q. Do you know that company and the work they perform? A. They perform electrical work of all nature, wiring buildings, apartment houses, power plants, and electrical work of any description.

Q. Do you know whether that company performed electrical work within the territorial limits of the District of Columbia? A. I do.

Q. State whether or not they do perform such work? A. I don't understand that.

19 Q. You stated that you did know whether they performed such work. A. They have performed millions of dollars worth of work in the District of Columbia and the surrounding area.

Q. State whether or not it is a fact that the E. C. Ernst Company has performed from time to time work at Quantico, Virginia. A. At the present time they are.

Q. What arrangement did you have with the E. C. Ernst Company for the hire of employees by that company? A. For the hiring?

Q. Yes, sir. A. They are hired through our office.

Q. It is a Union shop? A. It is a Union shop.

Q. Does your Union have a contract with the company? A. We have a contract with the Institute of Electrical Contractors, of which they are a member.

Q. Do you have a copy of such contract? A. Yes; that is a copy of the agreement (indicating).

I have the original here if you wish to examine it. It is the same as the agreement here but I cannot leave it here.

Mr. Carpenter: Would you like to look at it, Mr. Phelan?

Mr. Phelan: Yes.

By Mr. Carpenter:

Q. Does that contract provide for the wages of the employees of the company that belong to the Institute? A. It does.

Q. Does the E. C. Ernst Company belong to the Institute that is a party to this contract? A. They do.

Q. Does that contract provide for the payment of additional amounts to the employees of the members of the Institute hired through the local Union when they are working beyond the confines of the District? A. Yes; they receive extra compensation.

Mr. Phelan: I object to that. The contract speaks for itself.

Mr. Carpenter: I will introduce a copy of the contract. I am sure the contract will speak for itself.

The Deputy Commissioner: I will overrule the objection.

Mr. Phelan: The witness' answer is clearly contrary to the contract.

The Deputy Commissioner: I take it that the testimony of Mr. Preller is from his own knowledge of his own Union about the hire of employees through the Union.

The Witness: What was the question?

By Mr. Carpenter:

Q. Whether or not the contractor provided for the payment of additional sums to the members of the Electrical Workers Union No. 26? A. Carfare beyond the confines of the District of Columbia and if a man goes out of town, to stay out of town, it provides for their expenses to be paid.

Mr. Phelan: May I ask that he point that out in the contract at this time, if the Commissioner please?

The Deputy Commissioner: Wouldn't it be better to do that on cross-examination? You have the right to inquire.

The Witness: You have that in front of you, if you care to read it down there.

The Deputy Commissioner: Well, point it out. Let us save some time.

The Witness: Transportation and any necessary expense shall be provided on all jobs outside of the District of Columbia.

Transportation and any necessary expenses, such as board and lodging, shall be furnished for all work outside of the District of Columbia.

By Mr. Carpenter:

Q. You are reading from Rule 15, sub-paragraph (b)? A. That is right.

Mr. Phelan: My point is to get the language of the contract in the record.

The Deputy Commissioner: That will be introduced. We will have that in the record.

Mr. Carpenter: May I ask, Mr. Commissioner, that the copy of the contract be marked Exhibit No. 1?

The Deputy Commissioner: The printed copy in booklet form?

Mr. Carpenter: Yes.

Mr. Phelan: I have no objection.

The Deputy Commissioner: The Agreement between the Institute of Electrical Contractors of the District of Co-

lumbia and Local Union No. 26 of the International Brotherhood of Electrical Workers is received in evidence as Claimant's Exhibit No. 1.

Mr. Phelan: No objection.

By Mr. Carpenter:

Q. Did you know Clarence H. Ticer? A. I did.

Q. How long was he a member of the Local Union No. 26? A. Offhand, I would say, for the past fifteen years.

Q. Was he hired by the E. C. Ernst, Incorporated, pursuant to the provisions of the contract about which you have just testified? A. Yes.

Mr. Carpenter: You may examine.

Cross-Examination

By Mr. Phelan:

Q. Mr. Preller, will you read this please, Rule 15 (a) of the agreement that we have just been talking about? A. No travelling time shall be paid to workmen for travelling to or from any job in the jurisdiction of the Union when workmen are ordered to report to the job.

23

Q. In other words, pay time starts from the time they reach the job until they leave the job?

Mr. Carpenter: I object to that.

The Deputy Commissioner: The objection is overruled.

The Witness: The workmen are paid when they report to the job as the preceding article tells you, but they do receive compensation for going to and from jobs.

By Mr. Phelan:

Q. I am asking you if their pay time starts when they reach the job? A. That is right.

Q. And their pay time stops when they leave the job? A. Yes.

Q. And they are paid on an hourly basis? A. Yes, sir.

Q. What is the car fare to Quantico, Virginia? A. The amount that is allowed is two dollars a day for expenses, for travelling expenses.

Q. What is the car fare to Quantico, Virginia? A. I don't know. I don't know what runs down but the steam railroad, and I am not familiar with that.

24 Q. Are there any buses that go down there? A. I don't know.

Q. Well, you were the man who worked out this arrangement weren't you? A. We have been doing work at Quantico for the last eight years, and the men have received, always received two dollars a day expenses.

Q. They have always received two dollars a day expenses down there? A. That is right.

Q. What relation does that two dollars bear to their travelling expenses? A. I don't know that. That is the employment and the travelling expenses.

Q. But you don't know what the travelling expenses are? A. It would be around two dollars a day by going on the train.

Q. How much on the bus? A. I don't know whether there is a bus goes to Quantico or not.

Do you know?

Q. Yes, I know. A. I don't know whether the bus goes to Quantico.

Q. Let us analyze this section 15 (b) a little bit, a man taking a job, we will say, at Carderock, Maryland.

. . . . . .

25 The Witness: Transportation and necessary expenses. Whatever the transportation is to Carderock. I don't know what it is.

I think they receive a dollar a day to Carderock.

By Mr. Phelan:

Q. A dollar a day to Carderock? A. I am saying that from memory. I don't know. It is whatever the jobs are paid.

The contractor calls up to ask us what to figure for each job, and we find out the fare, train or bus, and we tell him to allow whatever it is as the case may be.

Q. Now, let us take to Cedar Point, Maryland. A. Two dollars a day.

Q. How can you get to Cedar Point on your two dollars a day? A. That is the tough part of it. The men have to use their own automobiles, and he is compensated to the extent of two dollars a day for the use of his own transportation.

Q. It cost more to get down there by public transportation. A. There is none down there that I know of.

26 Q. You can't get to Cedar Point by public transportation? A. I don't know; as far as I know.

You can go to Leonardtown on the bus and there may be a shuttle line, but that is the reason this clause was put in there, that the men would receive automobile money for the use of their automobile.

Q. Why isn't it worded they shall receive automobile money? A. We word that to the best of our ability, and it is worked out that they receive their travelling expenses.

Q. What I am bringing out is this: It bears no direct relation in the case whatever? A. We think it does.

Q. It bears no direct relation to the actual transportation cost; is that correct? A. We think it does.

Q. How does it cost a dollar to go back and forth to Carderock. That is not as far out as the Congressional Country Club, is it? A. I think it is past it. Carderock, Maryland, is beyond the Cabin John Bridge.

Q. It is not out as far as Great Falls, is it? A. Oh, no.

Q. Is it before you get to Great Falls? A. That

27 is the arrangement made before the jobs are set up, and all contractors pay the same.

They call us by phone and we find out about what the transportation is there, and if it is a dollar a day or fifteen cents a day—in some cases it is only twenty cents a day—and the job is paid under those arrangements.

Q. Let us assume that a man lives in Lorton, Virginia? He is under your jurisdiction, isn't he? A. That is right.

Q. And gets work, and you assign him to work at Quantico. What does he get? A. The same thing.

Q. He gets two dollars a day? A. Yes; he is working out of the Washington office, Washington, D. C.

Q. So that he gets two dollars transportation if he lives half way to Quantico? A. That is right.

Q. Let us assume a man, a member of your Union, lives in Quantico, and he works in Quantico on one of the jobs supervised by your Union. What does he get? A. If we have a man living in Quantico, he would receive two dollars a day.

Unfortunately, we don't have men living in Quantico. We are a Washington Union, and they mostly live in D. C. and the surrounding territory.

. . . . . .

28 Q. Let us assume a man did get a job, living in Washington, and got a job at Quantico, and he knew he was going to be there a long time on the job, and he moved his family down there to Quantico, in Quantico.

What would he get? A. Under our agreement he would receive the two dollars a day the same as the man who had to go back and forth.

Q. He would get the same thing? A. Absolutely.

Q. So that whether he travelled or whether he doesn't, he still gets his two dollars a day; is that correct? A. A man that lives on the job will receive two dollars; that is right.

. . . . . .

29 Q. When this work started at Quantico, you don't recall any determination or any investigation to determine what the transportation charge was, did you? A. Two dollars a day.

Q. Where does it cost two dollars? And what method of transportation? A. On the steam train.

Q. Two dollars on the steam train? A. Approximately; maybe a dollar ninety cents or something like that. They put the contract figure at two dollars, and they all figured the same way.

Q. That is an arbitrary figure fixed by the Union that all the contractors follow? A. That is correct.

Q. Now, in normal times when gasoline is plentiful, did the men still get their two dollars when they went down there? A. They have been getting that for the last ten years and before that.

Q. This contract is dated 1941. A. That contract runs from year to year, and there have been several changes in it. We usually renew that from year to year, and the body is practically the same for the last fifteen years.

Q. But that provision with reference to two dollars has been in force for some years? A. Not the two dollars, the clause reading transportation, travelling expenses and transportation.

Q. When did the two dollars go into effect? A. That was set up years ago. We have been doing work at Quantico for ten years, and they received two dollars despite the fact of the scarcity of gasoline, and they still receive two dollars.

Q. Now, Union requirements—the contract has no writing to determine what the employee shall do with the two dollars. A. No, if he buys gasoline or anything else, that is his own business.

Q. So that actually what this two dollars is is additional compensation for a man who was working at Quantico or Cedar Point? A. His travelling expenses.

Q. It is but if he doesn't use it for travelling expenses and he doesn't spend it for his travel, then it is additional compensation? A. I don't understand you.

If a man goes back and forth and he receives two dollars a day, now, hauling him down, back and forth, two dollars must be expended for wear and tear and the expenses.

Q. Assuming he is living down there. A. We don't assume that. Most of the men live in Washington.

If a man wants to move down there or live down there and come home on week-ends that is his prerogative.

The contractor doesn't care. He only pays him in conformity with the two dollars a day provided.

. . . . . .

32 Q. Now, Mr. Preller, we sent a subpoena over to the Union yesterday asking for any correspondence or papers relating to this contract. A. We have no correspondence. We do our business with the Institute of Electrical Contractors, of which the Ernst Company is a member.

Q. Is there any letter or contract in existence that you know of relating to this two dollars a day on this job, other than that contract? A. This is our agreement here.

Q. That is the agreement but, as I understand it,
33 any particular job—it is determined what all of the contractors shall put in for this requirement of rule 15 (b) under the contract.

Is that done by correspondence or just orally or by you? A. Orally or over the phone.

Q. It is just done orally over the phone? Never anything in writing about it? A. No.

Q. Why wouldn't you confirm it by letter? A. Why would we?

It has been the practice for the last fifteen years, and it has worked out perfectly on the transportation, no disagreements as to the amount of money paid.

If the Institute of Electrical Contractors are going to figure on a job, they call me and say, What would the wage be for a job two or three miles quite away from the bus, and if it is fifteen cents beyond the D. C. line, they all figure the same way.

Contractors from New York or Chicago ask and write us, and we send them a letter, and we say in that that the car fare is, whatever it will be, or if it is two dollars, and all contractors have an even chance to figure it.

Q. There is no requirement in your contract that the employer furnish transportation as such? A. Yes, there is; it says transportation.

34 Q. That is by bus, station wagon, or automobile?
A. No. It is up to the man to get that.

Q. It is up to the man to get there his own way? A. Yes; he is allowed transportation, so much for his transportation.

Mr. Phelan: That is all.

Redirect Examination

. . . . . .

Q. Therefore, if a man were living in Lorton, Virginia, and worked in Quantico, he would be paid the same amount of money, would he not for his transportation to Quantico and return? A. That is right.

. . . . . .

35 By the Deputy Commissioner:

Q. Mr. Preller, what is the reason for paying or allowing transportation to be paid to these men that work outside of the District? A. It works a hardship there on the man that has to go any distance and takes anywhere from an hour to an hour and a half of his time.

We feel he should get some extra compensation. We feel that the men should be compensated for their travelling expenses.

Q. You say that rule has been in effect for how many years? A. Ten or twelve years. I have been in this office for eleven years, and before that, twenty-five years that I know of. It has been in there as long as I have been in the Union, and I have been in the Union close to thirty years.

If I might go a little further. Here is a man living in Washington. There is work over at Dahlgren, Vir-

36 ginia, which takes a little time or he would have to stay there. A man should have some extra compensation for going down there and spending a whole week away and then only coming home on weekends. He should get extra compensation on that.

All he gets is two dollars a day for travelling expenses or it goes towards his board, which I don't think two dollars a day in these days will cover his board.

The same way at Cedar Point. They received two dollars a day there. Two dollars a day doesn't think about paying

a man's expenses there, but we told them two dollars a day when the job started, and we have to go through with it.

Q. To your knowledge, do these men form what is known as car pools? A. Oh, yes, sir.

Q. One of the employees owning a car will fill his car with other employees? A. If there is enough on the job, there will be four riding in one car, and lots of times there is only one or two men on the job. Sometimes one man has to come from one part of the city to another.

We can't regulate the men too much so a man might live in Maryland and will work in Virginia, or a man live in Maryland and might work in Virginia.

If a man has been with a contractor four years, he may live in Maryland and that contractor has work in
37 Maryland. In many cases a man will live in Maryland and will work in Virginia. It is pretty hard to arrange that, to break up the personnel of a man's shop to save travelling expenses, but we do it as much as possible, to cut down the travelling with the idea of conserving gasoline and tires, but it is impossible to go to that extent.

Q. It is not quite clear to me what the reason for that extra pay is.

I mean, for instance, as to whether it is to reimburse the man for the actual expense that he incurs in travelling to and from the place of employment, or if it is for the purpose of reimbursing him for the time consumed. A. A little of both. It is actually for the amount of time he uses in going to and from the job and is also—I don't think that with the way gas and automobiles are that a man is justified in going back and forth to Quantico for two dollars. He is actually losing money.

Q. If it were for the time consumed, wouldn't it be a lot more than two dollars? A. If he got it for the time, it would be two dollars an hour and that way it would be a lot more.

Q. Wouldn't you say it wasn't on that basis? A. It would be for his travelling expenses.

Q. Just the travelling expenses? A. It is. You might say two dollars a day for a man going to the job.

38 Q. Is that your definite statement that the reason for this extra pay or extra allowance made is for the actual expense which he would incur in going to and fro? A. That is actual expense, I would say, in going back and forth to the job.

The Deputy Commissioner: That is all.

Mr. Phelan: That is a conclusion of this witness as to his actual expense incurred while going back and forth to the job. It is not borne out by the witness' testimony concerning the facts.

The Deputy Commissioner: I will consider that.

. . . . . .

39 The Witness: Let us take Quantico, a man going back and forth from there. It was a time, some years ago, we didn't have bus transportation and they received two dollars a day and they had to go on the steam train.

Mr. Phelan: That is right.

The Witness: They received two dollars, and it has been pretty hard after a long standing established practice to get more money.

We have a tough time saying it would cost two and a half dollars, and the contractor would holler and he would not want to pay it, and for the last fifteen years they have been receiving two dollars.

Say a man would go on the bus, he would have to leave at four o'clock in the morning and spend the best part of his life travelling.

If you need men here today, now, skilled men, you
40 want to pay them forty cents less—the contractors would pay that man five dollars to get him on the job. They need skilled men now on the job. It is not a question of forty cents.

By Mr. Phelan:

Q. How do you know he would have to get up at four o'clock to get the bus? A. He would have to according to the bus schedule. They don't run them every hour.

Q. You don't know. A. They have to get up at five to go to the job in the automobile, and the bus would take longer, see?

. . . . . .

Q. You didn't investigate the bus schedule to find— A. (interposing) We don't need to investigate it.

. . . . . .

Q. The point I have in mind, Mr. Preller, is this: When buses started to go to Quantico, did you investigate to determine whether or not it would be advisable or feasible to change the arrangement and allow the men only the $1.60 that it would cost to go on the bus.

. . . . . .

41 A. I will answer "No."

We have received two dollars a day fo fifteen years. Now, we are not going to break up a practice that has been in existence for fifteen years to save forty cents and use up two hours of a man's time.

After all, here is what counts. We might sit around here and argue about forty cents, but skilled men is what we need to have in Quantico.

. . . . . .

42 Every contractor working at Quantico has allowed two dollars a day and that has been an established practice for fifteen years, regardless of whether the bus does it for a dollar and sixty cents. That is no concern of mine.

. . . . . .

Walter Charles Doe.

43 Direct Examination

By Mr. Carpenter:

Q. What is your position, Mr. Doe, with the Ernst Company? A. Vice President of E. C. Ernst, Incorporated, electrical contractors.

Q. Does E. C. Ernst, Incorporated, maintain an office in the District of Columbia? A. Yes.

Q. At what address? A. 1624 Fourteenth Street.

Q. What is the business of E. C. Ernst, Incorporated? A. General electric contractors.

Q. Electrical construction work? A. Yes, sir.

Q. Does E. C. Ernst Company do electrical construction work in the District of Columbia? A. Yes, sir.

Q. Are any jobs in progress now in the District of Columbia? A. Yes, sir.

44 The Deputy Commissioner: Are you trying to establish the residence of the deceased at the time of the accident?

45 The Witness: I don't think there is any question about that.

46 By Mr. Carpenter:

Q. Mr. Doe, when was Mr. Ticer hired by the E. C. Ernst Company? A. I should say about approximately ten years ago.

Q. He was hired through the electrical workers Union No. 26? A. That is right.

Q. Where was he hired? A. To work at that particular time.

Q. No. Where was the contract of employment made? A. Well, that I could not answer. That has been a long time ago, and what project he was to work on, that I could not tell you.

He was employed and worked on construction work, electrical construction work.

Q. Where was the contract of employment made? Where did you talk to him when you hired him? A. We always contact the Electrical Union, and they send us men.

47 Where did they send them? A. To our office or to the job. We would ask them to report to us.

Q. Your office is where? A. 1624 Fourteenth Street.

Q. I notice in your report that you made to the carrier under date of December 16, 1943, Mr. Doe, that you stated that Mr. Ticer was hired here in the District of Columbia, but he was to work and does work wherever he is needed on any of our jobs.

Isn't that a fact? A. Yes; he is hired to work on any job—any place I would want to put him.

Q. He was hired in the District of Columbia, wasn't he? A. Right; yes, sir.

Q. He would be subject to the orders then of the E. C. Ernst Company, or its officials, to report to work on a job within the District of Columbia or outside the District of Columbia, whichever the occasion might require; is that correct? A. That is correct.

. . . . . .

48 Q. And isn't it a fact that all of the men working
49 on the Quantico job live either within the territorial limits of the District of Columbia or in the suburbs immediately contiguous thereto? A. Yes; they all live within the District of Columbia or around it.

Q. Do they travel back and forth to the job site from their homes? A. I could not tell you that.

Q. Are they all paid two dollars a day in addition to their wages? A. Yes.

Q. To cover the cost of the transportation? A. They are.

. . . . . .

By Mr. Phelan:

Q. And those who lived in Virginia received the same amount as those that lived in the District of Columbia? A. That is right.

Q. And those that lived in Maryland received the same amount as those that lived in Virginia? A. That is right.

Q. In other words, you are told by the Union how much extra you must pay the men who are working at Quantico over and above the amount that those working in the
50 District of Columbia are to get; is that correct? A. That is correct.

* * * * * * * * * * *

Q. And you are told by the Union what amount you must pay, and as I understand it, all of the contractors agreed to accept that amount in their bid? A. That is correct.

Q. What is the practice that is followed in connection with the cost plus and fixed fee job—the same practice? A. We have always paid it, the transportation.

Q. You have always paid this additional amount? A. That is right.

Q. You didn't furnish transportation as such to any of the jobs? A. We have done it.

Q. You have done it in the past? A. Yes, sir.

Q. In cases where you have furnished transportation yourself is this additional allowance paid also? A. No.

By Mr. Carpenter:

51 Q. Is your answer "No"? A. Yes. We don't pay transportation when we furnish transportation to the men.

By Mr. Phelan:

Q. As I understand it, you undertake to exercise no jurisdiction at all or control on the method of transportation used by the various employees? A. No, sir; we have no control.

* * * * * * * * * * *

Q. Mr. Doe, do I understand that Mr. Ticer has been working for you for the last ten years? A. He has worked for us for the past ten years, but there was about six months that he went to work for the Federal Government.

. . . . . .

Q. Aside from the period that he worked for the Government of six months, he has been a steady employee
52 for you? A. Yes.

. . . . . .

Q. Did you have to rehire him every time you had a job? A. Well, no, we shipped them from one job to the other. When one job would run out we would transfer them to another job.

Q. In Mr. Ticer's case, you didn't have to contact the Union whenever you put him to work? A. Well, Mr. Ticer was the foreman down at Quantico, a sub-foreman, and naturally when we appoint a man we have to get the foreman from the Union and use a certain man as a foreman.

Q. When do you do that? A. When the job starts.

Q. Every time a new job starts? A. Yes. We have to get a foreman from the Union and use that man as foreman.

Q. Did the procedure in that with Mr. Ticer differ any from that of other employees you hired? A. No, sir; I don't think so.

. . . . . .

53 Q. Did you have a standing rule with the Union about Mr. Ticer acting as sub-foreman or foreman on your various jobs, or did you have to make a request on each occasion? A. No. When Mr. Ticer was put down there as sub-foreman we had a request, we put in a request to the Union to use him as foreman or sub-foreman, as the case may be.

Q. And that goes for every job that your had that Mr. Ticer worked for you? A. When he was foreman, but he wasn't always foreman.

Q. How long had he been working at Quantico at this particular job before the date of this injury? A. Mr. Ticer had been working there three to four years.

Q. He had worked at Quantico for three or four years prior to the date of his injury? A. Yes, sir.

Q. Steadily? A. Yes, sir.

* * * * * * * * *

54 Q. When you assigned Mr. Ticer to the job in Quantico, from the time that you assigned him to the job, had you transferred or changed his work to any other locality? A. No. He worked there for the past three years or more.

Q. Without any change? A. Yes, sir.

Q. He went there every day for the past three or
55 four years? A. Yes, sir.

Q. Did you have any job in the District of Columbia at that time? A. Yes, sir.

Q. Was there any connection between the job in Quantico with that of your work in the District of Columbia? A. No.

* * * * * * * * *

Q. I understand that Mr. Ticer was working on one job for three or four years time; is that right? A. Not on one job for three or four years.

Q. Various jobs in Quantico but in Quantico? A. Yes, sir; they are all on the site.

* * * * * * * * *

56 Q. Under what circumstances did you provide transportation for employees at any time? A. We had several of our own cars, that has been several years ago, and we had a station wagon, and we had another passenger car.

Q. How do you know how much to pay the men in addition to their regular salary? A. We contact the local Union.

Q. How do you do that? A. By telephone.

Q. What would you inquire about? A. We would ask them how much the rate would be, the expenses, the car fare for bus service or train, or whatever it may be, and it was determined that way.

Q. Did you ever question the amount fixed by the Union with respect to that charge? A. With respect to Quantico, no, because that was a general practice to pay that amount of money.

Q. For work done in Quantico? A. Yes.

Q. What is your understanding as what that payment represented? A. That was a reimbursement of their expenses, travelling.

57

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Q. What kind of place do you maintain in the District of Columbia—merely an office? A. Yes, we have an office, supply rooms, estimating rooms.

Q. What do you mean by supply rooms? A. Where we keep our materials and supplies.

* * * * * * * * * *

58 Q. Where do you furnish supplies for a job in Quantico? A. We buy directly from the factories. We have some supplies, but the majority of our stuff is bought out of town and shipped in.

* * * * * * * * * *

59. Q. Was it necessary for a new contract of employment to arise between the job at the Washington Navy Yard and the job at Quantico? Do you know? A. About Mr. Ticer?

Q. Yes. A. No.

Q. No new contract of employment? A. No.

Q. Now, with respect to the supplies for the Quantico job, in answer to the Commissioner's question you stated the majority of your supplies were shipped from the factory? A. That is right.

Q. Isn't it true that some of the supplies came from your supply house here in the District of Columbia? A. That is correct.

* * * * * * * * * *

61 Q. Has he been a foreman ever since he went to Quantico, a sub-foreman? A. I should say practically all the time.

Q. Is that why you moved him down there because you wanted him as a sub-foreman? A. That is right.

By Mr. Carpenter:

Q. When he went to Quantico pursuant to your order, did he immediately become a sub-foreman? A. Not immediately.

Q. You made him a sub-foreman after he had commenced work there? A. That is right.

. . . . . .

62 **Charles Joseph Sullivan.**

. . . . . .

Q. For whom do you work, Mr. Sullivan? A. For the E. C. Ernst Company, Incorporated.

Q. What is your position there? A. I am employed as a foreman.

Q. How long have you held that position? A. Practically since I was first employed by the E. C. Ernst Company. There have been times when I worked as a mechanic.

63 Q. Upon what particular job are your now employed? A. I am working in Quantico. I have supervision over several jobs there.

Q. How long have you been there? A. I have been in Quantico since September 22, 1940.

. . . . . .

Q. How long had Clarence worked at Quantico uninterruptedly prior to his death? A. He went to Quantico in November of 1940.

. . . . . .

Q. Where? Just prior to the time that you went to Quantico? A. I worked with Mr. Ticer on the Administration Building at the Washington Navy Yard.

Q. Was that the work site at which he was engaged just prior to the time that he went to Quantico? A. That is right.

Q. Was there any lapse between Mr. Ticer's leaving the Navy Yard job and his reporting to Quantico for work? A. No.

Q. Where were you hired, Mr. Sullivan, by the E. C. Ernst Company? At what place? A. At their office on Fourteenth Street.

Q. Do you know where Clarence was hired? A. I don't know exactly. I mean, I could not say where.

Q. Are any of the employees of the E. C. Ernst Company ever hired at the job in Quantico? A. No, sir.

Q. But all those men are hired elsewhere? A. Elsewhere; they are sent from our Washington office.

Q. They are sent from the Washington office? A. That is right.

. . . . . .

Q. Do you receive any additional payment from E. C. Ernst, Incorporated, over and above your wages which they pay you? A. Yes.

Q. You do? A. Yes.

Q. How much is that? A. Two dollars per day.

Q. What do you use that money for? A. I use it to pay my expenses for travelling back and forth in my car.

. . . . . .

By Mr. Phelan:

Q. As I understand it, Mr. Sullivan, there was a car pool of the employees down there in December of 1943; is that right? A. That is correct.

Q. Where did this pool meet? Where did they start from? A. At Roaches Run on the Mount Vernon Boulevard.

Q. Where is that with reference to Alexandria? A. It is—I could not tell you. It is at the Municipal Air Port; it is close to the Municipal Air Port.

. . . . . .

Q. How would you get from your house to Roaches Run? A. I would drive over in my car.

. . . . . .

Q. How would Ticer get there? He would do the same thing.

. . . . . .

Q. They would bring their own cars over to Roaches Run? Park their cars, and then all get into one car? A. Yes.

Q. And go on from there to Quantico; that is right? A. That is right.

Q. Now, on the way back the cars that brought you down would go as far as Roaches Run and then you would stop and get into your own cars; is that right? A. That is correct.

. . . . . .

67 The Deputy Commissioner: For my own information, where did this accident happen, before getting to Roaches Run?

Mr. Phelan: Yes, sir.

Mr. Carpenter: On the way back.

. . . . . .

Q. How did you folks go? Through Alexandria? A. We would come to Alexandria and take Route 1, which is the Washington-Richmond Highway.

The Mount Vernon Boulevard goes directly to Mount Vernon and that is a little further.

Q. There wasn't anyone to tell you how you should go? A. Oh, no.

Q. You worked that out for yourself? A. Yes, sir.

Q. Was there any control exercised by the Ernst
68 Company over the method by which you were to get to Quantico? A. None whatever.

Q. Were you given the privilege of living down there if you wanted, as well as coming back and forth? A. It was entirely optional on the part of the men, whether they lived there or drove back and forth.

. . . . . .

Q. By the way, where were the men paid? Were they paid here in Washington or at Quantico? A. They were paid in Quantico.

However, Mr. Acker or Mr. Doe would drive to Quantico from Washington and pay the men off.

. . . . . .

Q. Would that pay include the two dollars a day transportation? A. Yes, sir; that was included.

. . . . . .

70 Q. Is there any bus service available between Washington and Quantico proper? I don't mean Triangle; I mean Quantico proper. A. Not to my knowledge.

. . . . . .

71 Q. What would happen, Mr. Sullivan, if a man were ill upon the day that he should be paid, or possibly take a day off, or be off for any other reason? Would he then go to the office in Washington to receive his money? A. As a rule, I would take the money, take charge of the money until he came in the next day.

However, there have been times, if it was raining and it was also pay day, that I would call the office and they would hold his money at the Washington office, and he would then come directly to Washington, to the Washington office to receive his money.

Q. So that sometimes men actually did come to the Washington office to be paid? A. Yes, sir.

. . . . . .

72 Q. Whose car was used, Mr. Sullivan, in making the trip from Roaches Run to Quantico and from Quantico back to Roaches Run? A. Whose car?

Q. Yes. A. We alternated. First one man would use his car—I would use my car one day and we rotated, each one of us would drive.

Q. How many employees were in that car pool? A. Five.

. . . . . .

74 Q. Do you know the circumstances under which Mr. Ticer went to Quantico? A. Well, all I knew was that I needed men. I always when I need men I call Mr. Doe, and he sends men down, whoever I require.

Q. You send for the particular individual? A. No; I don't ask for a particular individual. I just tell Mr. Doe that I need so many men.

Q. Are any of the mechanics regularly employed by Mr. Ernst? A. Well, yes.

Q. In other words, do I understand that you don't have to go to the Union for men for all jobs? A. By regularly employed, as long as a man is regularly employed it is not necessary to go to the Union since he is regularly employed and working every day.

He can go from one job to the other as long as there is no lapse in between or as long as the contractor does not lay him off, or dismiss him.

Q. Was Mr. Ticer, in your opinion, regularly employed by E. C. Ernst, Incorporated? A. Yes, sir.

. . . . . .

75 By the Deputy Commissioner:

Q. Without the use of an automobile, how could you have gotten from the District of Columbia to the job at Quantico? A. Well, I suppose you could go to the Union Station and get a train, or you could get a bus as far as Triangle and walk the three or four miles from the highway into Quantico, the town proper.

Q. How about by train? Would you have any distance to travel after getting off the train to the job? A. Yes. You would have to walk to the job on the Post, depending on where that particular job was located. It could be as much as two miles.

. . . . . .

77 Q. The two dollars per day for transportation, that applied to everybody, mechanics as well as foremen

and regardless of rate of pay; is that correct? A. That is correct.

. . . . . .

By Mr. Carpenter:

Q. Mr. Sullivan, you testified that in December of 1943 there were approximately ten men employed at Quantico? A. As near as I can recall.

Q. That is ten men working during that month approximately? A. Yes; sir.

Q. Do you know where these men lived and where their homes were? A. Well, all of these men, to the best of my knowledge, lived either in the District of Columbia or close by the District, or in Arlington or Fairfax County.

I think one lived in a trailer camp on the other side
78 of Alexandria.

Q. And they commuted between Quantico and their homes? A. Yes; they all commuted in their cars.

. . . . . .

Q. What are the hours of employment? A. We are allowed to work eight hours between seven-thirty and four-thirty, and the seasons of the year has something to do with that. We have been working from eight to four-thirty, but generally speaking, we work from seven-thirty to four.

. . . . . .

Q. And the basic pay began when you arrived on the job? A. That is correct.

Q. And when you left the job? A. That is right.

Q. That is, it terminated when you left the job? A. That is right.

By Mr. Phelan:

Q. This one man who lived in a trailer camp on the other side of Alexandria, he got two dollars the same as anyone else? A. That is right.

By the Deputy Commissioner:

Q. Did he live there before he began to work for Ernst or did he move down there because of the Employ-
79 ment? A. He lived there for several years.

He worked at the Pentagon Building and still lived at the trailer camp.

. . . . . .

Mrs. Virginia Catherine Ticer.

. . . . . .

80 Q. You are the widow of Clarence Hastings Ticer, Jr.? A. Yes, sir.

Q. How long did you live with Clarence Hastings Ticer, Jr., prior to his death? A. A year and a half.

Q. At what address? A. 2505 Thirteenth Street, Northwest.

Q. During the time that you lived with Clarence Hastings Ticer, Jr., was it his habit to come home every night from his work in Quantico? A. Yes, sir.

Q. Every night? A. Yes, sir.

Q. How long have you been a resident of the District of Columbia? A. Yes, sir; about seventeen years.

Q. Seventeen years? A. Yes, sir.

Q. You are still a resident of the District of Columbia? A. Yes, sir.

. . . . . .

Q. Just one question, Mrs. Ticer.

Where did Mr. Ticer live before he moved to 2505
81 Thirteenth Street? A. He lived on 1326 Longfellow Street.

. . . . . .

Q. How long did he live there, if you know? A. I would say for a year or more.

Q. He used to live in Virginia? A. Yes, he did.

. . . . . .

82 Q. How long have you known him? A. About three or four years.

Q. Where was he living when you first met him—in Virginia or Washington? A. In Virginia then.

. . . . . .

Q. So that somewhere within the last three or four years he was a resident of Virginia? A. That is right.

. . . . . .

83 **James G. Farley.**

. . . . . .

By Mr. Phelan:

. . . . . .

Q. Mr. Farley, did you at my request call up the bus line to ascertain the round trip bus fare to Quantico, Virginia? A. Yes, I did; yes, sir.

Q. What did you do? What response did you get?—A. Well, as I understand it, from the bus terminal down here at Twelfth Street and New York Avenue, to the best of my recollection, the number is National 8000, and I phoned there and I asked the cost for travel by bus to Quantico, Virginia, and in reply to that question, I was informed that it was a dollar and sixty cents.

Q. For the round trip? A. Yes, sir.

. . . . . .

Q. Mr. Farley, you are employed by the Liberty Mutual Insurance Company? A. That is correct.

. . . . . .

84 Q. I have one question.

Do you know whether, as a matter of fact, of your own knowledge, Mr. Farley, whether or not a bus actually does run from Washington to Quantico proper? A. No, I don't of my own knowledge. I have never made any trips down there by bus.

Q. The information that you secured from the office might have related, might it not, to the fare, the round trip fare between Washington and gates to Quantico? A. I just asked the fare to Quantico and that is what they told me.

Q. It might have been to the gates of Quantico? A. I don't know what it might have been. I just asked the fare to Quantico and they told me a dollar and sixty cents. I don't know what it might have been.

Q. Are you familiar with the grounds at Quantico? A. No; I have a vague recollection of Quantico, that is down that way.

. . . . . .

108 **E. R. Leister.**

. . . . . .

109. Q. Will you please state your name and address? A. E. R. Leister, 339 North Fillmore, Arlington, Virginia.

Q. Mr. Leister, are you an employee of E. C. Ernst? A. I am.

Q. For how long have you been such an employee? A. Between eight and ten years.

Q. Were you an employee of E. C. Ernst, Incorporated, on December 13, 1943? A. Yes, I was.

Q. At what place were you working on that date? A. Quantico, Virginia, Marine Barracks.

. . . . . .

Q. On the morning of December 13, 1943, how did you get to Quantico, Virginia? A. We met at Roaches
110 Run at the parking lot, and we all got into Ticer's car at that point and travelled from there to Quantico.

Q. That is Mr. Clarence Ticer? A. That's right.

Q. It was your habit to commute between the job and your home? A. That's right.

Q. Were you paid any expense money by E. C. Ernst for that travel? A. We were paid our transportation.

Mr. Phelan: I object to that as being a conclusion. I think all we are interested in here are the facts.

. . . . . .

Q. Did you work the full day of December 13th? A. We did.

Q. At the Quantico job? A. At the Quantico Barracks.

. . . . . .

111 Q. What time did you quit that day? A. The same time, 4:30.

Q. What did you do immediately after quitting the job at the close of the day?

. . . . . .

A. We just finished up and got in Ticer's car and started home.

Q. What route did you follow on the way back to Washington that day? A. The same route, No. 1 Highway.

112 Q. State whether or not that is the most logical route to follow from Quantico to Washington? A. That's right.

Q. Were any stops made for the convenience of Ticer or any of those riding in the car that day? A. None whatsoever.

Q. As you proceeded up the highway you approached Fort Belvoir, Virginia, which is located on Route No. 1? A. That's right.

Q. What happened as you approached that place? A. We come in just beyond the viaduct just approaching Belvoir. Traffic was quite heavy, and this truck was coming down going towards Richmond and we were going toward Washington, and I distinctly saw something come from the rear wheel of this big heavy truck and, to the best of my recollection, there was a big heavy canvas top, and as this object came away from the rear of the truck it sort of followed the truck, and we were going in the opposite direction, and there was a slight curve and incline, and I saw this object coming up about six or eight feet from the ground.

and I saw it coming and hollered "Duck." It was about 25 or 30 feet from us, and I hollered "Duck," and whether Mr. Ticer ducked I couldn't say, and there was a terriffic explosion.

Q. Do you mean a noise? A. A noise, and every-
113 thing went dark in the car, and I raised my head and noticed Ticer had slumped, and I immediately took hold of him and kicked his foot off the gas, and brought it out of traffic, and as soon as I did I turned off the ignition.

Q. Did you ascertain, Mr. Leister, what the object was you saw coming through the air? A. I couldn't at the time. We found it in the car. It landed in the car.

Q. What was it? A. It was a rock three or four inches in diameter.

By the Deputy Commissioner:

Q. Three or four inches in diameter? A. Yes, sir. It was about that big (Indicating), a flat, oval shaped rock that weighed about two pounds, or better.

By Mr. Carpenter:

Q. Two pounds or better? A. Yes, sir, I would say.

Q. How did it gain entrance through the car? A. Through the windshield in front of the driver.

. . . . . .

114 Q. Did the object strike Mr. Ticer? A. Right on the top of the head, right here. (Indicating.)

By the Deputy Commissioner:

Q. Across the left side? A. The left side of the scalp.

Q. Above the hair line? A. Above the hair line, yes; right in here. (Indicating.)

By Mr. Carpenter:

Q. Had it rendered him unconscious? A. Immediately.

. . . . . .

115 Q. Now, Mr. Leister, the day of the accident, that is, December 13, 1943, was the automobile which Mr. Ticer was driving transporting any equipment, tools, or other possessions of the men that might be used in their employment? A. Yes, sir. He was carrying my tools at the time. I was being transferred back to Vint Hills.

Q. You say you had been transferred? A. Yes.

Q. From whom had you received orders? A. From the foreman to go back to Vint Hills to complete the
116 project I had been working on up there.

Q. Was that customary? A. That is customary procedure, yes.

Q. You did not return to the Quantico job then on the morning of December 14th? A. No. It was about a week or ten days before I went back. It was after Mr. Ticer's death and burial that I went back.

Q. On December 14th, then, you went to the Vint Hills job. A. Yes.

Q. You transported your tools down to the Vint Hills job? A. That's right.

Q. Your tools were necessary to your work? A. Absolutely.

Q. You are now working at Quantico? A. At Quantico, yes.

. . . . . .

118 Q. How long since you have worked for them in Washington on a job? A. In Washington? I worked for them just before I went to Quantico two days, and then transferred right back to Quantico. I was at the McLean estate.

Q. When was that at the McLean estate? A. I think about two days before Christmas.

Q. That was finished in 1943? A. In '43.

Q. That project has been built well over a year. A. Not the one in back of T 8, that temporary building, and then they put in what they call a fire house building right in back of that, and I worked on that.

Q. You worked on that two days and then went back to Quantico? A. That's right.

119 Q. Now, tell me what was your practice in going to Quantico. You didn't use your car? A. At that time I didn't use my car. It was up for repair with broken springs, and I had to use other cars.

Q. In other words, when you went down there, if you went with Sullivan you paid Sullivan? A. I paid whoever I went with that day.

Q. And on that day you paid Ticer? A. I paid Ticer that afternoon.

Q. How much did you pay him? A. I paid him a dollar a day.

120 Q. You paid him a dollar a day for the use of the other car? A. Yes, sir.

Q. And that was the understanding, if you weren't using your car you paid the man who was using his car? A. Yes.

Q. And that is the way it worked out? A. That is the way it worked out.

Q. The agreed price among yourselves for the two-way trip was a dollar? A. That's right.

Q. Now, as I understand it, one of the men who was in your group, or at least was employed by the Ernst Company down there at that time, lived south of Alexandria in a trailer camp? A. That's right; Ted Overley lived at the trailer camp right opposite Pendall.

Q. And Overley was there with you at that time? A. Overley was riding with us at the time.

121 Q. Were there any other paying customers in Ticer's car that day? A. I was the only one at the time.

Q. You were the only one at the time? A. If I recall correctly; there may have been Barksdale. I don't know

whether he had his car in the pool at that time, or not. I think Barksdale was a paying customer and later put his car into the pool.

Q. But at that time his car was not in the pool, and he was paying his fare? A. Yes, I think at that time he was a paying customer.

Q. And he would likewise give Ticer, or whatever man was the driver, the dollar for the day he drove? A. That's right.

. . . . . .

122 Q. Now, in your particular case you got your two dollars just the same from the Ernst Company? A. That's right.

Q. And you, in turn, would disburse a part of that two dollars to Mr. Ticer, or whoever else was doing the driving? A. Yes, sir.

Q. Your best impression is that at that time Barksdale was under the same arrangement? A. Yes.

. . . . . .

125 By the Deputy Commissioner:

Q. Mr. Leister, it isn't quite clear to me what the practice was with respect to the pool, the car pool.

126 My understanding is that a group of five, those that you mentioned, were in this pool? A. That's right.

Q. And each one of you perhaps outside of the two who drove to the meeting point, Roaches Run, would drive your own car to this point in the morning? A. That's right.

Q. And then you would all get in one car and drive from Roaches Run to Quantico? A. That's right.

Q. Now, whose car was usually selected to drive from Roaches Run to Quantico? A. We would alternate.

Q. You would alternate? A. As our day would come up.

Q. And when you drove from Roaches Run to Quantico in some one else's car you paid what price? A. No, not when you have your car in the pool.

When you have your car in the pool you just alternate. At this particular time we have four in the pool, and you drive every fourth day, and the other days you ride with the others.

Q. At that particular time your car was not in the pool? A. That's right.

Q. The morning of Decen ber 13th the five of you, you and the other men rode from Roaches Run to Quantico in Ticer's car? A. Not from Roaches Run; four of us from Roaches Run down to Pendall, where we picked up Overley, who waits for us right on the highway, and then to Quantico.

Q. And the same five came home that night? A. That's right.

Q. Of those five how many did you say paid fare? A. I think there was two of us paying at the time, Barksdale and myself.

. . . . . .

Q. You testified, Mr. Leister, that just prior to Christmas, 1943, you worked a couple of days at the McLean estate, I imagine "Friendship?" A. That's right. They call it the McLean estate. It is right on the same grounds. They had this temporary building and they added a new building to that.

Q. Prior to that time had you worked on other jobs in the District of Columbia for the E. C. Ernst Company? A. Yes, sir.

Q. You would be assigned, then, sometimes to jobs within the boundaries of the District? A. Yes, sir, most of my time.

Q. Most of your time, of the time since you have been working with Ernst? A. That's right.

. . . . . .

Mrs. Virginia Ticer.

132 Q. When were you married to Clarence H. Ticer?
A. June 14, 1942.

Q. Where were you married? A. Dillon, South Carolina.

Q. Where did you live immediately subsequent to your marriage to Mr. Ticer? A. At 804 L Street Northeast.

Q. Washington, D. C.? A. Yes.

Q. From the time you lived at that address to the time of your husband's death did you live constantly with him as his wife? A. I did.

Q. In the District of Columbia? A. Yes, sir.

Q. Were you living with him as his wife at the time of his death? A. Yes.

Q. What address? A. 2508 Thirteenth Street Northwest.

138 **Walter C. Doe.**

140 Q. . . . what do you have to do with respect to the local union at the time you are changing a mechanic to sub-foreman? A. We write a letter to the local asking permission to use a certain man as a foreman, and the routine, I believe, is that they have an executive board meeting and approve or disapprove him as a foreman.

Q. Is that a temporary measure or permanent? A. That is for the duration of the job.

Any job that he goes on as a foreman on the job, we have to write and ask permission to use him as such.

Q. In this particular case did you ask the union's approval to change Ticer from a mechanic to the status of a sub-foreman? A. Yes.

142 Q. Mr. Doe, does the E. C. Ernst Company carry unemployment insurance for its employees? A. Do we?

Q. Yes, the E. C. Ernst Company? A. Yes.

Q. Where do you pay those premiums? A. I would have to check that with the bookkeeper.

Q. You pay it in the District of Columbia, don't you? A. In the District of Columbia, yes.

Q. That is the District of Columbia unemployment compensation? A. Yes, sir.

Q. Was Mr. Ticer subject to the orders of the E. C. Ernst Company during the time he was working down at Quantico? A. State that again?

Q. Was he subject to the orders of the E. C. Ernst Company while he was working down at Quantico? A. Yes, sir.

Q. If occasion demanded that you transfer him to another job he would have to be withdrawn by the company?

143 A. We have permission to move them wherever we want.

Q. So that if you had need for him on a job other than at Quantico you had the authority to move him? A. Yes.

III.

EXHIBITS.

Excerpts from Claimant's Exhibit No. 1.

86 AGREEMENT

Made December 2, 1941.

Between the

INSTITUTE OF ELECTRICAL CONTRACTORS

of the

DISTRICT OF COLUMBIA, INC.

and

LOCAL UNION No. 26,

of the

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

Fundamental Principles: This agreement is based upon the following set of fundamental principles, affirmed by the parties hereto:

1. Close contact and a mutually sympathetic interest between employee and employer will develop a better working system which will tend constantly to stimulate production while improving the relationship between employee, employer and the community.

. . . . . .

87 Now therefore, in consideration of the mutual promises and agreements herein contained, the parties hereto agree as follows:

. . . . . .

Rule 2.

(c) Every individual Employer shall carry Workmen's Compensation Insurance and such other insurance as may be required by the laws of the District of Columbia and states within the jurisdiction of Local Union, No. 26, and shall furnish satisfactory proof thereof to the Union.

Rule 3. (a) Eight hours shall constitute a work day between 7:30 a.m. and 4:30 p.m. on Mondays to Fridays, inclusive.

Rule 15. (a) No traveling time shall be paid to workmen for traveling to or from any job in the jurisdiction (to or from any job in the jurisdiction) of the Union when workmen are ordered to report to the job.

(b) Transportation and any necessary expense such as board and lodging shall be furnished for all work outside the District of Columbia.

(c) The Employer shall pay full expenses, including traveling time, on all jobs outside the jurisdiction of the Union.

INSTITUTE OF ELECTRICAL CONTRACTORS OF THE DISTRICT OF COLUMBIA, INC.

Joint Conference Committee.

JOSEPH KIRCHNER.
ROBERT W. McCHESNEY.
A. H. WILSON.
HARRY W. KELLAMS.

LOCAL UNION, No. 26, INTERNATIONAL BROTHERHOOF OF ELECTRICAL WORKERS.

Joint Conference Committee,

JAMES E. BOLAND,
JAMES F. McDONOUGH,
WALTER J. GRIBBIN,
C. F. PRELLER.

Claimant's Exhibit No. 2.

100 1622-24 14th St., N. W.
Washington, D. C., Dec. 16, 1943.

Report of Mr. Walter Doe, Vice President of E. C. Ernst, Inc., 1622-24 14th St., N.W., and also field superintendent.

Approximately ten years ago I hired one Clarence H. Ticer, Jr., at present living at 2505 13th St., N.W., to work for E. C. Ernst as an electrician. I hired Mr. Ticer through the Electricians Union, Local #26, located at 403 11th St., N. W., Wash., D. C. Mr. Ticer was hired here in the District of Columbia, but he was to work, and does work, wherever he is needed on any of our jobs. In addition to his salary he also receives transportation money whenever his work takes him outside the District of Columbia. This transportation money is paid as the result of an agreement reached with the Electricians Union. At present Ticer has been working for approximately the past two years in Quantico, Virginia on our jobs. He has been working as a sub-foreman. He received ($2.00) Two dollars per day transportation money which is equivalent to round trip bus fare to and from Quantico, Virginia. He was not under any orders from me or E. C. Ernst, Inc., as to how he was to go to and from our job in Quantico, nor were any of the men. The men could go by bus, train, private car or any way they wished, provided they got to work. Ticer and the men were not under any order or request as to how they should

101 reach the job in Quantico or spend their daily transportation money. We gave no orders as to car pools, etc. Ticer was not required to furnish transportation for men on the job in going to and from the job. Nor was he required by us to carry tools or material to and from Quantico, Virginia. E. C. Ernst, Inc. did not furnish transportation by any vehicle. On December 13th, 1943, at approximately 5 p.m. while on his way home to Washington, D. C., Ticer was injured. While passing Fort Belvoir on U. S. #1, a truck going in the opposite direction may have struck a stone in the road causing it to fly through the air, through the windshield of Ticer's car, which he was driving, and striking Ticer on the head injuring him. At the time Ticer was taking (4) four fellow employees back to Washington. He was carrying these men voluntarily as a result of private arrangements with them and not upon the orders of E. C. Ernst, Inc. He was not on any errand for E. C. Ernst, Inc., and was not carrying company tools or equipment. I have read the above statement and is correct to my knowledge.

(Signed) WALTER C. DOE, Vice Pres.

102 **Carrier's Exhibit A.**

Report of Mr. Charles Joseph Sullivan, Franklin Park, Falls Church, Virginia, employed as job superintendent by E. C. Ernst Co. of 1622-24 14th Street, N. W., Washington, D. C., on the E. C. Ernst Co. Quantico, Virginia Marine Barracks job, where E. C. Ernst Co. has been working for approximately the past four (4) years. Clarence Ticer, Jr., of Washington, D. C., worked under me as a sub-foreman. On Monday, December 13, 1943, at about 5:15 P.M., while going home from work, Clarence Ticer was injured. I did not see Ticer injured, but understand from the men who were riding in his car with him at the time that a stone crashed through the windshield and struck Ticer full on the head. A Mr. Earl Leister, who was seated beside Ticer, managed to grab the wheel with

one hand and steered the car to the side of the road. This accident to Ticer happened, so I understand, on U. S. Route #1 in front of Fort Belvoir, Virginia, and while Ticer was giving four (4) fellow employees of E. C. Ernst a lift home. Ticer is not required by E. C. Ernst Co. to transport fellow employees to and from work at Quantico, and such was voluntary on his part. The men usually formed car pools among themselves to arrange transportation. We received $2.00 per day transportation allowance to cover transportation to and from the Quantico job. E. C. Ernst Co. gave us this amount through agreement with the electricians' union—I.B.E.W. Local #26. We were not required
103 to spend this daily transportation allowance in any particular way and it was left up to each man as to how he wanted to get to the job. Usually we—myself included, traveled to work daily in one or another's cars. We met every morning at Roachs Run on U. S. Memorial Boulevard and we would all park our cars and then go from there to the job in one car—or two if the number of men was large enough. We had no fixed schedule as to taking turns, and were not bound by any schedule but usually everyone took their turn so that no one had to do more driving than anyone else. As time went on Ticer and I formed the habit of driving in the other's place should one of us be absent. I was foreman, and he was sub-foreman. There were no definite arrangements between us about this but we had become accustomed to taking each other's place automatically when one was supposed to drive and did not show up at Roachs Run, or could not make it. Now, on Monday, December 13, 1943, it was my turn to drive, but Ticer drove in my place. I did not tell him I was not coming, nor did I ask him to drive in my place. On the morning of December 13, 1943, I was ill and did not report at Roachs Run, and Ticer drove in my place. On Monday, December 13, 1943, while driving home, Earl Leister brought his tools with him and Ticer carried them in his car. I did not require Ticer to carry tools or materials in his car and did

not order him to do so on December 13, 1943, or any time.

As a matter of fact, union rules forbid the men carry-
104 ing tools and materials. I never ordered Ticer to drive in my place if I could not make it, and did not do so on or prior to December 13, 1943. I have read the above three pages and they are true to the best of my belief and knowledge.

(SGD) CHARLES J. SULLIVAN

(SGD) (witness to signature) MARY M. SULLIVAN.

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58 Tuesday, February 5th, A. D., 1946

The Court met pursuant to adjournment. Present: Honorable D. Lawrence Groner, Chief Justice, Harold M. Stephens, Henry W. Edgerton, Bennett Champ Clark, Wilbur K. Miller, and E. Barrett Prettyman, Associate Justices.

Before Honorable D. Lawrence Groner, Chief Justice Bennett Champ Clark, and Wilbur K. Miller, Associate Justices.

* * * * * *

No. 9086, January Term, 1946

Liberty Mutual Insurance Company et al., appellants

vs.

Frank A. Cardillo, Deputy Commissioner, U. S. Employees' Compensation Commission &c., et al., appellees

Argument commenced by Mr. Arthur J. Phelan, attorney for appellants continued by Mr. Ward E. Boote, attorney for appellee, and continued by Mr. Arthur J. Phelan.

* * * * * *

59 United States Court of Appeals, District of Columbia

No. 9086

Liberty Mutual Insurance Company, and E. C. Ernst, Inc., appellants

v.

Frank A. Cardillo, Deputy Commissioner, U. S. Employees' Compensation Commission for the District of Columbia, and Virginia C. Ticer, appellees.

Appeal from the District Court of the United States for the District of Columbia

Argued February 5, 1946—Decided April 8, 1946

Mr. Arthur J. Phelan, with whom Mr. Edward B. Williams was on the brief, for appellants.

Mr. Ward E. Boote, Chief Counsel, U. S. Employees' Compensation Commission, with whom Messrs. Edward M. Curran, U. S. Attorney, and Daniel B. Maher, Assistant U. S. Attorney, were on the brief, for appellee Frank A. Cardillo. Mr. Homer S. Carpenter appeared on the brief as attorney for appellee Virginia C. Ticer.

Before GRONER, C. J., and CLARK and WILBUR K. MILLER, JJ.

WILBUR K. MILLER, J.: This appeal brings before us for review a judgment of the District Court of the United States for the District of Columbia which affirmed a compensation award under the Longshoremen's Act.[1]

The evidence clearly showed that Walter H. Ticer had been employed for some ten years before his death on December 17, 1943, by E. C. Ernst, Inc., a corporation engaged in the electrical construction business. The Ernst firm was incorporated in, had its principal office in, and did much of its construction work in, the District of Columbia. It also had substantial contracts elsewhere, including one at the U. S. Marine Base at Quantico, Virginia, which had been in progress for several years. Ticer, who lived in the District of Columbia, was assigned with other employees to the Quantico job in 1940. He did all his work and received his pay in Quantico.

It was the custom of those employees who lived in or near Washington to drive their personally owned automobiles
60 to a central starting point each morning. There four or five would get in one automobile and proceed to Quantico, leaving the other cars until they returned that evening, thus economizing on gasoline and oil and minimizing depreciation on the automobiles. Any employee who did not contribute a car to the "pool" paid $1.00 for the round trip to him whose car was being driven to Quantico.

On December 13, 1943, it was Ticer's turn to drive his car the entire distance. He was accompanied by four co-workers, two members of the car pool and two who paid him $1.00 each for the day's transportation. As Ticer drove his car homeward that evening and was approaching Fort Belvoir, Virginia, a truck passing in the opposite direction somehow picked up a stone from the surface of the highway. The stone was hurled through the windshield and struck Ticer on the head. From the injury so sustained, he died three days later.

Compensation for the death having been awarded to Ticer's widow by the deputy commissioner, E. C. Ernst, Inc., and Liberty Mutual Insurance Company, its compensation insurance carrier, sued to vacate the award. The District Court granted a motion to dismiss, and the employer and its insurance carrier appeal.

The position of the appellants is (1) that the conclusion of the deputy commissioner that the injury arose out of and in the course of the employment was contrary to the law and to the evidence, and

[1] Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, U. S. C. Title 33, ch. 18, § 901 and following, as made applicable to the District of Columbia, 45 Stat. 600, Title 36, § 501, District of Columbia Code, 1940

(2) that the deputy commissioner did not have jurisdiction to make an award.

The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of employment. Ordinarily, the hazards they encounter during those journeys are not incident to the employer's business.[2] This is not an inflexible rule, however, and exceptions to it may arise either through the employer's agreement to that effect, or from the circumstances of the case from which appropriate authority implies an agreement on the part of the employer to compensate for injuries received in going to and from work.

The general rule stated in the Voehl case was recognized by this court in *Ward* v. *Cardillo*,[3] and a statement of four exceptions thereto was approved. Those exceptions are:

(1) where the employer requires the employee to travel on the highways;

(2) where the employer contracts to and does furnish transportation to and from work;

(3) where the employee is subject to emergency calls, as in the case of firemen;

(4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer.

The appellees attempt to justify the award in this case by saying that it falls within the second exception, in that E. C. Ernst, Inc., contracted to and did furnish transportation to and from work.

61 As a member of the Institute of Electrical Contractors of the District of Columbia, E. C. Ernst, Inc., was bound by the terms of a contract between that institute and a local union of electrical workers, of which Ticer was a member. The pertinent paragraphs of the contract between the institute and the union are shown in the margin.[4] As a matter of practice, however, Rule 15 (b) was not followed by the parties with respect to the work at Quantico. By an oral agreement subsequent to the formal written contract there was substituted for the obligation of the employer to transport employees engaged in work outside the District of Columbia an arrangement by which Ernst paid each employee the flat sum of $2.00 per day as transportation expense.

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[2] *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 169.

[3] 135 F. (2d) 280, 77 App. D. C. 343.

[4] "Rule 15. (a) No traveling time shall be paid to workmen for traveling to or from any job in the jurisdiction, (to or from any job in the jurisdiction) of the Union where workmen are ordered to report to the job.

"(b) Transportation and any necessary expense such as board and lodging shall be furnished for all work outside the District of Columbia.

"(c) The Employer shall pay full expenses, including traveling time, on all jobs outside the jurisdiction of the Union."

This applied whether the employee lived in the District of Columbia, in Quantico, or at an intermediate point. E. C. Ernst, Inc., did not furnish vehicles for transportation, did not contract with others to transport its employees, did not furnish gasoline or oil, and did not specify the means or route by which employees should reach the work site at Quantico. Each employee was entirely free to select the method by which he would reach Quantico each day and by which he would return to his home at its close.

The right to compensation under the act depends, of course, upon the existence of the relation of master and servant at the time of the injury. The liability is based, the Supreme Court has said, "not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured."[5] Continuing, the Supreme Court said, "And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory though it need not be the sole or proximate cause. * * *".

No exact rule can be formulated from the decisions beyond the broad generality of the Voehl case that ordinarily injuries received while going to and from work are not compensable, and the category of exception set out in Ward v. Cardillo, supra. The reason for the general rule expressed in the Voehl opinion is that during the journeys to and from work, usually the master and servant relation does not exist. During the relation, the employee must go where he is told to go, must do what he is told to do, when and where he is instructed to do it. He is following, not his will, but the will of his employer; so, if he is hurt while going or doing as he has been instructed, his injury is compensable. But when the relation ends, he is again a free agent, choosing his own way, and the time and place of his own acts; if injured, there can be no compensation because there is no causal connection between the injury and the employment.

62 Throughout practically all the decisions we have examined, including those cited by the appellees, runs the thread of the employer's control over the employee as the distinguishing characteristic which indicates the existence of the relation of master and servant. For example, an employee is deemed to be in the course of his employment while going to or from his place of work by the only practicable route of immediate ingress and egress.[6] Obviously, it is so held because the location of the

[5] Cudahy Co. v. Parramore, 263 U. S. 418.
[6] Cudahy Packing Co. v. Parramore, 263 U. S. 418; Erie R. R. Co. v. Winfield, 244 U. S. 170; T. J. Moss Tie Co. v. Tanner, 44 F. (2d) 928.

employer's plant forces the employee to use a single way of ingress and egress, and so the employer's control during its use is implied.

The difference between the cases so holding and the present case is manifest. Here the control of the employer over the acts and movements of the employee ended with the close of the work day at Quantico. So the master and servant relation ended then.

In our view, the fact that by contract the employer paid Tice $2.00 per day in addition to his earnings, found by the deputy commissioner to be "in lieu of the employer's supplying transportation," does not take the case out of the general rule of the Voehl case; on the contrary, the amendment of the original contract concerning the furnishing of transportation by the employer took this situation out of the scope of the second exception mentioned in Ward v. Cardillo and placed it within the general rule. As we have said, a new contract was made by the terms of which money was to be paid in lieu of furnishing actual transportation. Under that arrangement, the employee became, at the close of the day's work, entirely free of his employer's control. The relation of master and servant terminated as the work-day ended, and thereafter the employee assumed his own risk in subjecting himself to the hazards of the highway. Our opinion is that the lower court erred in sustaining the motion to dismiss. This view makes it unnecessary to consider the question of jurisdiction.

Reversed.

Judge Groner is of opinion the decision of the lower court was correct and should be affirmed.

63 United States Court of Appeals for the District of Columbia

No. 9086—April Term, 1946

LIBERTY MUTUAL INSURANCE COMPANY, A CORPORATION, ET AL., APPELLANTS

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL., APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Before GRONER, C. J., and CLARK, and WILBUR K. MILLER, JJ.

United States Court of Appeals for the District of Columbia. Filed Apr. 8, 1946. Joseph W. Stewart, Clerk.

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed with costs against appellee Ticer, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice WILBUR K. MILLER.

Dated April 8, 1946.

Mr. Chief Justice Groner is of opinion the decision of the lower court was correct and should be affirmed.

United States Court of Appeals for the District of Columbia

No. 9086

LIBERTY MUTUAL INSURANCE COMPANY AND E. C. ERNST, INC., APPELLANTS

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION FOR THE DISTRICT OF COLUMBIA, AND VIRGINIA C. TICER, APPELLEES

United States Court of Appeals for the District of Columbia. Filed June 13, 1946. Joseph W. Stewart, Clerk.

64 *Designation of record*

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix to appellant's brief.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

(S) J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 13th day of June 1946.

(S) ARTHUR J. PHELAN,
Of counsel for Appellants.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 64, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellees in the case of: Liberty Mutual Insurance Company and E. C. Ernst, Inc., Appellants vs. Frank A. Cardillo, Deputy Commissioner, U. S. Employees' Compensation Commission for the District of Columbia, and Virginia C. Ticer, Appellees, No. 9086, April Term, 1946, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this twenty-fourth day of June A. D. 1946.

[SEAL] (S) JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

65 In the Supreme Court of the United States

October Term, 1946

No. —

FRANK A. CARDILLO, DEPUTY COMMISSIONER, U. S. EMPLOYEES' COMPENSATION COMMISSION FOR THE DISTRICT OF COLUMBIA, AND VIRGINIA C. TICER, PETITIONERS

v.

LIBERTY MUTUAL INSURANCE COMPANY AND E. C. ERNST, INC., RESPONDENTS.

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled case that:

1. For the purpose of the petition for a writ of certiorari and, in the event the petition be granted, for the purpose of hearing and

determining the case on the merits, the printed record shall consist of the following:

a. Joint Appendix to appellants' brief.

b. The proceedings had before the United States Court of Appeals for the District of Columbia as set forth in the Designation of Record filed by the Petitioners.

2. Petitioners will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of record in the Court of Appeals for the District of Columbia, and any of the parties may refer in their briefs and arguments to said transcript of record, including any part which has not been printed.

J. Howard McGrath,
J. Howard McGrath,
Solicitor General.

June 13, 1946.

Arthur J. Phelan,
Attorney for Respondents.

June 13, 1946.

66 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY

JUL 2 1946

No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1946

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC., AND VIRGINIA C. TICER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 265

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC., AND VIRGINIA C. TICER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General on behalf of Frank A. Cardillo, Deputy Commissioner, United States Employees' Compensation Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in the above-entitled case on April 8, 1946.

OPINIONS BELOW

The District Court of the United States for the District of Columbia did not render an opinion. The opinion of the United States Court of Appeals for the District of Columbia (R. 59–62) is reported at 154 F. 2d 529.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1946 (R. 63). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, upon review of an order of the Deputy Commissioner under the District of Columbia Workmen's Compensation Law (making applicable to the District of Columbia the basic federal Longshoremen's and Harbor Workers' Compensation Act) awarding compensation to the widow of a deceased employee, the court below erred in failing to accord finality to the Deputy Commissioner's finding that the employee's injury arose out of and in the course of his employment.

2. Whether, as a matter of law, an injury to an employee occurring while on his way home from work is not an injury arising out of and in the course of his employment, within the meaning of the District of Columbia Workmen's Compensation Law (making applicable to the District of Columbia the basic federal Longshoremen's and Harbor Workers' Compensation Act), where the employer has undertaken in the contract of employment to furnish transportation to and from work, but where he makes a per diem payment to the employee for transportation expense in lieu of actually supplying transportation.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, c. 509, 44 Stat. 1424, *et seq.*; 33 U. S. C. 901 *et seq.*), and of the Act of May 17, 1928 (45 Stat. 600, D. C. Code, 1940, Title 36, Chap. 5, § 1), hereinafter referred to as the District of Columbia Workmen's Compensation Law, are set forth in the Appendix, pp. 14–15, *infra*.

STATEMENT

On December 13, 1944, respondents, E. C. Ernst, Inc. (the "employer") and Liberty Mutual Insurance Company (the "insurance carrier") instituted this action in the District Court of the United States for the District of Columbia, to set aside an order issued under the District of Columbia Workmen's Compensation Law, awarding compensation to the claimant Virginia C. Ticer, a party hereto, as surviving spouse of one Clarence H. Ticer ("Ticer") (R. 2–10).

The Deputy Commissioner's findings (R. 7–10) in support of his order may be summarized as follows: Ticer, a resident of the District of Columbia, was hired as an electrician by E. C. Ernst, Inc., a contractor, engaged in electrical construction work in the District of Columbia and surrounding areas (R. 7–8). In November, 1940, the employer transferred Ticer from a construction project in the District of Columbia to a job at the Quantico Marine Base (R. 8). Under the

agreement between the Electrical Workers Union and the employer, it was provided that for all work outside the District of Columbia "transportation and any necessary expense, such as board and lodging, shall be furnished" by the employer (R. 8). The sum of $2.00 per day was fixed by the parties to the agreement as transportation expense, and represented the approximate cost of travel from the District of Columbia to the Marine Base and return (R. 8). This amount was paid to Ticer in addition to the regular hourly rate of pay, and was in lieu of the employer's supplying transportation (R. 8). As the Quantico job site was several miles away from the bus or train terminal, it was necessary for Ticer and his co-workers to drive their own automobiles to and from work (R. 8). The employees formed a car pool, and each morning they started from their homes in their own automobiles to a designated meeting place at Roaches Run, Virginia, and then would proceed in one car to the job site (R. 8–9). The workers alternated in the use of the cars for that part of the trip, nonmembers of the car pool each paying the car owner $1.00 for the round trip (R. 9). The employer was aware of the means of transportation being used, and acquiesced therein (R. 9). On December 13, 1943, while Ticer and four co-workers were riding in his car on a direct route from his place of employment to his home, an accident occurred near

Fort Belvoir, Virginia, causing his death on December 17, 1943 (R. 7, 9).

At the hearing before the Deputy Commissioner on a claim for compensation by Ticer's widow, the insurance carrier contended that the Virginia Compensation Commission had sole jurisdiction over the claim, that the claimant was not a "dependent widow" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and that Ticer's injury "did not arise out of or in the course of employment" (R. 13–14). The Deputy Commissioner, however, ruled adversely to these contentions, and on July 21, 1944, issued his order awarding death benefits and funeral expenses to the claimant (R. 4, 10).

The employer and insurance carrier then filed their complaint (R. 2–6) in the District Court for review of the order, renewing their challenge to the Deputy Commissioner's jurisdiction, and alleging a want of substantial evidence to support the finding that Ticer's injury arose out of and in the course of his employment. Upon motions of the Deputy Commissioner and the claimant (R. 11–12), the District Court dismissed the complaint on the grounds that the Deputy Commissioner's findings were "supported by evidence in the record" and that the compensation order was "in all respects in accordance with law" (R. 12–13). On appeal, the court below reversed, Chief Justice Groner dissenting (R.

63). Without passing upon the jurisdiction of the Deputy Commissioner, the majority held that Ticer's injury had not arisen out of and in the course of his employment, since "the control of the employer" over Ticer's "acts and movements" ended "with the close of the work day at Quantico", thereby terminating the master and servant relationship (R. 62).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding as a matter of law that an employee's injury cannot arise out of and in the course of his employment, if the injury occurs under circumstances where the employer lacks "control" over "the acts and movements of the employee."

2. In holding that Ticer's injury did not arise out of and in the course of his employment, and in refusing to accord finality to the Deputy Commissioner's finding in this regard.

3. In holding that the $2.00 transportation payment to Ticer was made pursuant to a "new contract" and not to the original employment contract.

4. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

This case presents questions of substantial importance in the administration of federal work-

men's compensation laws.[1] The decision below fails to give effect to applicable decisions of this Court as to the finality to be accorded administrative findings in compensation cases; in its substantive aspects, it is squarely in conflict with *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162; and it narrows, in an important aspect, the protection afforded by federal workmen's compensation laws against the hazards of employment. The substantive question presented—whether an injury to an employee occurring while on his way home from work is an injury arising out of and in the course of his employment where, under

[1] While the immediate statute involved is the District of Columbia Workmen's Compensation Law, that Law merely extends to the District of Columbia the basic federal statute, the Longshoremen's and Harbor Workers' Compensation Act (see Appendix, *infra*, p. 14). This circumstance was commented on in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285, where the Court said:

> In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of § 20 (d).

The basic Longshoremen's Act has also been extended to other areas by the Defense Bases Act of August 16, 1941 (Appendix, *infra*, pp. 15–16).

the contract of employment, the employer has undertaken to furnish transportation to and from work, but where, in lieu of actually supplying transportation, he makes a per diem payment to the employee for transportation expense—is, we are advised by the United States Employee's Compensation Commission, one of substantial importance in the field of workmen's compensation, for it is of a type which constantly arises in the administration of federal workmen's compensation laws.

1. The majority opinion below ignores the rule, repeatedly laid down by this Court, requiring that findings of fact made by the Deputy Commissioner as to whether an injury arose out of and in the course of employment must be regarded as conclusive if supported by evidence. *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166; *Del Vecchio* v. *Bowers*, 296 U. S. 280; *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246. The court below was clearly in error, since without even referring to those limitations on the scope of judicial review, it embarked on an independent determination as to whether Ticer's injury arose out of and in the course of his employment. That was an issue left primarily to the Deputy Commissioner, whose findings of fact with respect thereto were final and conclusive, under the cases cited, because supported by evidence. Even if

the evidence permitted "an inference either way * * *, the Deputy Commissioner and he alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court." *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287. By disregarding those standards of judicial review, the decision of the court below strikes at the heart of the statutory plan for providing a "prompt" and "inexpensive" method for the disposal of workmen's compensation claims. *Crowell* v. *Benson*, 285 U. S. 22, 45–47.

Unquestionably there was ample evidence before the Deputy Commissioner to support his finding (R. 9) that Ticer's injury arose out of and in the course of his employment. The testimony showed conclusively that the transportation to and from work, in the circumstances of this case, was an incident of the employment. This appeared from the contract of employment itself under which the employer agreed with the employees that he would furnish transportation with respect to "all work outside the District of Columbia" (R. 53). Moreover, the exigencies of the employment were such, by reason of the location of the work, the hours of work, and the lack of transportation facilities, as to require as a practical matter that the employer make some arrangement for transportation if employees were to be ob-

tained for the job.[2] It is a fair inference that the $2.00 transportation payment was the employer's way of carrying out his undertaking to provide transportation. Even if "more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner's finding that [Ticer] was acting in the course of his employment." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246.

The majority below, apparently making its own findings of fact, held that the original agreement to furnish transportation "was not followed by the parties with respect to the work at Quantico" and that a "new" oral contract to pay the transportation expenses supplanted the written agreement (R. 61). Certainly the record compelled no such conclusion, for it is reasonable to infer, as the Deputy Commissioner apparently did, that the oral arrangement for paying the employees $2.00 per day for transportation was merely the implementation of the agreement to furnish transpor-

[2] The evidence shows that the employees generally worked from 7:30 A. M. until 4:30 P. M. (R. 40). Although there was train and bus service to a place called Triangle, near Quantico, there was no such service to Quantico proper (R. 38, 39), and in order to use public transportation, it would have been necessary for employees to arise at 4 o'clock in the morning (R. 27, 28), and then walk two to four miles at the Quantico end (R. 39). No transportation to the job site was available (R. 38). The need for skilled men at Quantico was such that apparently the contractors would have paid Ticer $5.00 to get him to work (R. 27, 28).

tation. Especially is this true in view of the unchallenged basic findings of the Deputy Commissioner that the $2.00 per day represented the approximate cost of travel from Washington, D. C., to the Quantico Marine Base and return, and that the job site at Quantico was several miles away from the bus or train terminal (R. 8). Furthermore, since the written employment contract was renewed from time to time without change in the transportation provision, even though the same manner of implementation was being followed (R. 23, 24), it is likewise reasonable to infer that, over the 10- to 15-year period, the payment of the transportation expense was not a mere substitution of or variation from the contract, but was the carrying out of the contract itself; otherwise, the written contract provision undoubtedly would have been changed to accord with the substitute.

2. The majority below was equally in error in holding, as a matter of law, that, as a condition precedent to liability for compensation in a "transportation" case, the employer must have "control" over the "acts and movements" of the employee during the transportation (R. 62). On this point the decision below is squarely in conflict with *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, where this Court sustained a finding by the Deputy Commissioner that the employee's injury was compensable, even though the injury occurred

while the employee was driving his own automobile and while he was on his way to the employer's place of business. Under the *Voehl* case, the test to be applied is whether, as a part of the contract of employment, the employer agreed to furnish transportation to and from work—the means being unimportant; and where there is such agreement, whether expressed or implied, the transportation becomes an incident of the employment and injuries occurring during the course of transportation are considered to arise out of and in the course of the employment. As this Court stated in the *Voehl* case (288 U. S. at 169–170): "While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere"; the employer may agree "that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return", and in such case "the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act." Nowhere did this Court suggest any rule of law making "control" by the employer a prerequisite to finding an injury to have arisen out of and in the course of employment; and in other jurisdictions the cases are legion in which injuries have been held compensable in "transportation" cases, although the employer could not have had

any real or substantial control over either the employee or the means of transportation.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

JULY 1946.

[8] See, *e. g.*, *Liberty Mutual Ins. Co.* v. *Gray*, 137 F. 2d 926 (C. C. A. 9); *Lehigh Nav. Coal Co.* v. *McGonnell*, 120 N. J. L. 428, affirmed, 121 N. J. L. 583; *Williams* v. *Travelers Ins. Co.*, 19 So. 2d 586 (La. App.); *Swanson* v. *Latham*, 92 Conn. 87; *Turner Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433. Numerous cases are collected in 85 A. L. R. 978 and 96 A. L. R. 467.

APPENDIX

1. The Act of May 17, 1928 (District of Columbia Workmen's Compensation Law) (c. 612, 45 Stat. 600, D. C. Code, 1940, Title 36, c. 5, § 1) provides in part:

> SEC. 1—The provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

2. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*) provides in part:

> SEC. 2. DEFINITIONS.—When used in this Act—
>
> * * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such

accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * * *

SEC. 3. COVERAGE—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

* * * * * *

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

3. The Act of August 16, 1941 (Defense Bases Act) (c. 357, 55 Stat. 622, 42 U. S. C., Supp. IV, 1651 *et seq.*) provides in part:

Except as herein modified, the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927 (44 Stat. 1424), as

amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs.

U. S. GOVERNMENT PRINTING OFFICE: 1946

FILE COPY

DEC 27 1946

No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1946

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC., AND VIRGINIA C. TICER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 265

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC., AND VIRGINIA C. TICER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court for the District of Columbia did not render an opinion. The opinion of the Court of Appeals for the District of Columbia (R. 59–62) is reported at 154 F. 2d 529.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1946 (R. 63). The petition for a writ of certiorari was filed on July 2, 1946, and was granted on October 14, 1946 (R. 65). The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, upon review of an order of the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, as applied to the District of Columbia, awarding compensation to the widow of a deceased employee, the court below erred:

(a) in failing to accept as final the Deputy Commissioner's finding that the employee's injury arose out of and in the course of his employment; and

(b) in holding, as a matter of law, that an injury to an employee while traveling home from work is not an injury arising out of and in the course of his employment, where the employer has undertaken in the contract of employment to furnish "transportation" to and from work, but instead of providing transportation, compensates the employee for furnishing his own transportation, and hence has no "control" over the employee's "acts and movements" during the course of such transportation.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; 33 U. S. C. 901 *et seq.*), and of the District of Columbia Workmen's Compensation Law (Act of May 17, 1928, 45 Stat. 600, D. C. Code, 1940, Title 36,

Chap. 5, § 1), are set forth in the Appendix, pp. 37–39.

STATEMENT

On December 13, 1944, respondents, E. C. Ernst, Inc., (the "employer") and Liberty Mutual Insurance Company (the "insurance carrier") instituted this action in the District Court of the United States for the District of Columbia to set aside an order issued by the petitioner under the District of Columbia Workmen's Compensation Law, awarding compensation to the claimant Virginia C. Ticer, a party hereto, as widow of Clarence H. Ticer, who had been employed by Ernst (R. 2–10).

The Deputy Commissioner's findings (R. 7–10) in support of his order may be summarized as follows: Ticer, a resident of the District of Columbia, had been employed since about 1934 as an electrician by E. C. Ernst, Inc., a contractor, engaged in electrical construction work in the District of Columbia and surrounding areas (R. 7–8).[1] In November 1940, the employer transferred Ticer from a construction project in the District of Columbia to a project at the Quantico Marine Base (R. 8). In the agreement between the electrical workers' union and the employer, it was provided that for all work outside the District of Columbia "Transportation and any necessary expense, such

[1] The Deputy Commissioner expressly found that "on the date of the injury the employer was carrying on employment in the District of Columbia as an electrical contractor * * * [and] maintained an office at 1622 Fourteenth Street, Northwest, Washington, District of Columbia" (R. 7).

as board and lodging, shall be furnished" by the employer (R. 8, 53). The sum of $2.00 per day was fixed by the parties to the agreement as transportation expense, and represented the approximate cost of travel from the District of Columbia to the Marine Base and return (R. 8). This amount was paid to Ticer in addition to the regular hourly rate of pay, and was in lieu of the employer's supplying transportation (R. 8). As the Quantico job site was several miles away from the bus or train terminal, it was necessary for Ticer and his co-workers to drive their own automobiles to and from work (R. 8). The employees formed a car pool, and each morning they started from their homes in their own automobiles to a designated meeting place at Roaches Run, Virginia, and then would proceed in one car to the job site (R. 8-9). The workers alternated in the use of the cars for that part of the trip, nonmembers of the car pool each paying the car owner $1.00 for the round trip (R. 9). The employer was aware of the means of transportation being used, and acquiesced therein (R. 9). On December 13, 1943, while Ticer and four coworkers were riding in his car (which he was driving) on a direct route from his place of employment to his home, an accident occurred near Fort Belvoir, Virginia, causing his death on December 17, 1943 (R. 7, 9).[2]

[2] A large stone, which came from under the rear wheel of a passing truck, crashed through the windshield of the car, struck Ticer on the head, and crushed his skull (R. 7).

At the hearing before the Deputy Commissioner on a claim for compensation by Ticer's widow, the insurance carrier contended that the Virginia Compensation Commission had sole jurisdiction over the claim, that the claimant was not a "dependent widow" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and that Ticer's injury "did not arise out of or in the course of employment" (R. 13–14). The Deputy Commissioner, however, ruled adversely to these contentions, and on July 21, 1944, issued an order awarding death benefits and funeral expenses to the claimant (R. 4, 10).

The employer and insurance carrier then filed their complaint (R. 2–6) in the District Court for review of the order, renewing their challenge to the Deputy Commissioner's jurisdiction, and alleging a want of substantial evidence to support the finding that Ticer's injury arose out of and in the course of his employment. Upon motions of the Deputy Commissioner and the claimant (R. 11–12), the District Court dismissed the complaint on the grounds that the Deputy Commissioner's findings were "supported by evidence in the record" and that the compensation order was "in all respects in accordance with law" (R. 12–13). On appeal, the Court of Appeals for the District of Columbia reversed, with Chief Justice Groner dissenting (R. 63). With-

out passing upon the jurisdiction of the Deputy Commissioner, the court held that Ticer's injury had not arisen out of and in the course of his employment, since "the control of the employer" over his "acts and movements" ended "with the close of the work day at Quantico," thereby terminating the master and servant relationship (R. 62).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding as a matter of law that an employee's injury cannot arise out of and in the course of employment, if the injury occurs in circumstances where the employer lacks "control" over "the acts and movements of the employee."

2. In holding that Ticer's injury did not arise out of and in the course of his employment, and in refusing to accord finality to the Deputy Commissioner's finding in this regard.

3. In holding that the $2.00 transportation payment to Ticer was made pursuant to a "new contract" and not to the original employment contract.

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

I

The court below should have accorded finality to the Deputy Commissioner's finding that

Ticer's injury arose out of and in the course of his employment, for it is well settled that such a finding is conclusive if it is supported by evidence and has a reasonable basis in law. *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244; *Voehl v. Indemnity Insurance Co.*, 288 U. S. 162; *Davis v. Department of Labor*, 317 U. S. 249. The evidence showed that by a provision of the employment contract, in effect for some 15 years, the employer was required to furnish "transportation"; that this obligation was regularly discharged either by furnishing the transportation itself, or by paying the employee the cost of the transportation; and that the $2.00 per day had been paid by the employer in this case in lieu of providing transportation. The character of the employment was such, by reason of the location of the work, the hours of work, and the inadequacy of public transportation facilities, as to require as a practical matter that the employer make some arrangement for transportation if employees were to be obtained for the job.

In the light of all the circumstances, the Deputy Commissioner was justified in finding that Ticer's transportation to and from work was an incident of his employment, and that, for purposes of workmen's compensation, he was in the service of his employer while going to and from work. Even if "more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy

Commissioner's finding that [Ticer] was acting in the course of his employment." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246.

There was clearly a reasonable basis in law for the finding. The criteria applied were those enunciated in *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, which holds that whether the hazards of an employee's journey to and from work are hazards of the employment turns upon the nature and circumstances of the particular employment, and in a large measure depends upon the terms of the employment agreement, whether express or implied. Administrative disposition of "transportation" cases of this sort involves evaluation of the particular facts and circumstances, and so long as the Deputy Commissioner applies the correct standards of law, his determination should be judicially examined only to the extent of ascertaining whether it has support in the record.

The ruling by the court below that, as a matter of law, the award could be sustained only if the employer has "control" over "the acts and movements" of the employee during the transportation, is squarely in conflict with the *Voehl* decision. There the employee was driving his own automobile; the employer, in fact, had no control over his acts and movements. The inadequacy of the "control" test is also evidenced by the numerous instances in which compensation is awarded where there is no real or substantial control by the em-

ployer over the employee's movements or the means of transportation. "Control" is, at best, a vague and indefinite standard. If applied to the field of workmen's compensation, it would reintroduce the uncertainties that have long plagued the courts in applying the doctrine of *respondeat superior*, and would be inconsistent with the statutory policy of providing a "prompt" and "inexpensive" method for the disposal of workmen's compensation claims. *Crowell* v. *Benson*, 285 U. S. 22, 45–47. While some state authorities refer to the "control" test in some "transportation" cases, even there only lip service is frequently paid to the doctrine; and where, as here, there is an express agreement to provide transportation, the doctrine is ordinarily not applied to defeat the employee's right of recovery. In other jurisdictions, the "control" test is completely rejected.

II

The Deputy Commissioner's finding that he had jurisdiction—despite the length of time Ticer worked in Virginia and the occurrence of the injury there—followed the plain command of the statute that it "shall apply in respect to the injury or the death of an employee of an employer in the District of Columbia, irrespective of the place where the injury or death occurs". It was contended below that where the injury occurs outside the District, the Act can apply only if the employee spent more time working within the District than outside the District. But the record

does not show that this was true of Ticer, and even if it did, that would not bar jurisdiction. To do so would require a limitation on the unambiguous language of the statute. The extraterritorial provision in the Act is designed to cope with the special circumstances involved in providing adequate workmen's compensation for what is essentially a city-state. Application of that provision here raises no problem of due process or full faith and credit. The public interest which the District had in Ticer's employment is at least as strong as the interest which was held sufficient for California to award compensation in *Alaska Packers Association* v. *Industrial Commission*, 294 U. S. 532.

ARGUMENT

I

THE COURT BELOW SHOULD HAVE ACCEPTED AS FINAL THE DEPUTY COMMISSIONER'S FINDING THAT TICER'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT

Section 1 of the District of Columbia Workmen's Compensation Law provides in part that the "'Longshoremen's and Harbor Workers' Compensation Act' * * * shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs" (Appendix, p. 37). "Injury" is defined in the Longshoremen's Act, Section 2 (2), as "accidental injury or death arising out of and in the course of employ-

ment * * *" (Appendix, p. 37). Accordingly, a fundamental prerequisite to compensation under the District of Columbia Workmen's Compensation Law is a finding that the injury was one "arising out of and in the course of employment."[3]

In setting aside the Deputy Commissioner's finding (R. 9) that Ticer's injury arose out of and in the course of his employment, the court below failed to accord the finality which the statute attaches to that finding. Section 19 (a) of the Longshoremen's Act, which provides for the filing of a "claim for compensation," specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim" (Appendix, p. 38). Section 21 (b) provides that compensation orders may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law" (Appendix, p. 38). Under these sections, it is well-settled that the findings of the Deputy Commissioner are conclusive if they are supported by evidence and have a reasonable basis in law. *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166, 169; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287; *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251; *Parker* v. *Motor Boat*

[3] This is the classic phrase found, with few exceptions, in the various workmen's compensation laws of the states. See C. C. H. Workmen's Compensation Law Reporting Service (1946) Pars. 1004–1054; Dodd, *Administration of Workmen's Compensation* (1936), p. 681.

Sales, Inc., 314 U. S. 244; *Davis* v. *Department of Labor*, 317 U. S. 249, 256. The Deputy Commissioner is not limited to finding the basic or underlying facts; he may draw conclusions or inferences therefrom and if the facts permit "an inference either way" (*Del Vecchio* v. *Bowers*, *supra*, at p. 287), the Deputy Commissioner "alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court" (*ibid.*). And these principles are applicable to the question whether a particular injury arose out of and in the course of employment (*Voehl* v. *Indemnity Insurance Co.*, *supra*, at p. 166; *Parker* v. *Motor Boat Sales, Inc.*, *supra*, at pp. 245–246; cf. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131). The answer to this question must turn "upon the nature and circumstances of the particular employment" (*Voehl* v. *Indemnity Insurance Co.*, *supra*, at p. 169). The issue is one "in which particular facts and circumstances are vital elements," and the Deputy Commissioner's conclusion will be rejected by this Court "only in cases of apparent error." Cf. *Davis* v. *Department of Labor*, *supra*, at pp. 256–257.

The court below did not refer to these limitations on its power to review. The court embarked upon an independent appraisal of the evidence and reached its own determination as to whether Ticer's injury arose out of and in

the course of his employment. In so doing, we believe, the court was clearly in error. There was substantial evidence and a reasonable basis in law for the conclusion that Ticer's injury arose out of and in the course of his employment, and the Deputy Commissioner's finding should therefore have been treated as conclusive. Cf. *Unemployment Compensation Comm. of Alaska v. Aragan*, No. 25, this Term, decided December 9, 1946.

A. THE DEPUTY COMMISSIONER'S FINDING HAD A REASONABLE BASIS IN LAW

The Deputy Commissioner's finding (R. 9) that Ticer's injury arose out of and in the course of his employment had a reasonable basis in law, and in no way embodied novel principles. The relevant criteria to be applied in "transportation" cases, and which were applied by the Deputy Commissioner here, were those enunciated over a decade ago in *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, where this Court sustained an award of compensation by the Deputy Commissioner, even though the injury occurred while the employee was driving his own automobile and while he was on his way to the employer's place of business. This Court there observed (288 U. S. at 169–170):

> * * * The general rule is that injuries sustained by employees when going to or returning from their regular place

> of work are not deemed to arise out of and in the course of their employment. [Citing cases] Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment. "No exact formula can be laid down which will automatically solve every case." *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 424. See, also, *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act. [Citing cases]

Thus, under the *Voehl* case, whether the hazards of an employee's journey to and from work are hazards of the employment turns upon the nature and circumstances of the particular employment,

and in a large measure depends upon the terms of the employment, whether they be embodied in an express agreement or based upon a course of business. The proper disposition of "transportation" cases of this sort involves, not reference to rules of law, but rather evaluation of the particular facts and circumstances—and so long as the Deputy Commissioner follows applicable legal standards, his determination will not be reexamined by the courts if it has support in the evidence.[4] Indeed, as has already been noted,

[4] Awards of compensation in the following "transportation" situations have generally been sustained: (1) where the employment requires the employee to travel on the highways—*Bennett* v. *Marine Works, Inc.*, 273 N. Y. 429, 7 N. E. 2d 847 (travelling salesman); (2) where the employer furnishes transportation to and from work, in his own vehicle (*Mullen* v. *Delaware, L. & W. R.*, 151 Pa. Super. 410, 30 A. 2d 141; *California Casualty Indemnity Exchange* v. *Ind. Acc. Comm.*, 21 Cal. 2d 461, 132 P. 2d 815; *State Highway Commission* v. *Saylor*, 252 Ky. 743, 68 S. W. 2d 26; *W. C. Sharp Drug Stores* v. *Hansard*, 144 S. W. 2d 777 (Tenn.)); or in the vehicle of an independent contractor (*Liberty Mutual Insurance Co.* v. *Gray*, 137 F. 2d 926 (C. C. A. 9); *American Coal Mining Co.* v. *Crenshaw*, 77 Ind. App. 684, 133 N. E. 394; *Central Construction Co.* v. *Harrison*, 137 Md. 256, 112 Atl. 627. Contra: *St. Helens Colliery Co.* v. *Hewitson*, [1924] A. C. 59; but cf. *Weaver* v. *Tredegar Iron & Coal Co.*, [1940] A. C. 955); or in the vehicle of a fellow employee (*Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 Atl. 492; *Konopka* v. *Jackson Co. Road Comm.*, 270 Mich. 174, 258 N. W. 429); (3) where the employee is subject to emergency call at all times—*Reisinger-Siehler Co.* v. *Perry*, 165 Md. 191, 167 Atl. 51; (4) where the employee is on a "special mission" for the employer—*Gagnebin* v. *Ind. Acc. Comm.*, 146 Cal. App. 80, 34 P. 2d 1052; *Keely* v. *Metropolitan Edison Co.*, 41 A. 2d

Section 21 of the Act specifically provides that a compensation order can be set aside only "if not in acordance with law" (Appendix, p. 38).

Notwithstanding the admonition in the *Voehl* case (288 U. S. at 169) that "No exact formula can be laid down which will automatically solve every case," the court below ruled as a matter of law that, as an indispensable condition precedent to liability for compensation in a "transportation" case, the employer must have "control" over the "acts and movements" of the employee during the transportation (R. 62). On this point the decision below is squarely in conflict with the *Voehl* case, since the employee there

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420 (Pa. Super.); or (5) where the employee's compensation covers travel time—*McKinney* v. *Darlac*, 48 N. M. 149, 146 P. 2d 867; *Exelbert* v. *Klein & Kavanaugh*, 278 N. Y. S. 377, 243 App. Div. 839; *Western Pipe and Steel Co.* v. *Ind. Acc. Comm.*, 49 Cal. App. 2d 108, 121 P. 2d 35. In other "transportation" situations, there is divergence in the authorities, only some sustaining compensation awards (a) where the employer does not undertake to supply transportation but simply bears the cost thereof (see cases cited *infra*, pp. 18–19); (b) where the employer furnishes a free pass on its own public vehicles (*Ridermacher* v. *St. Paul City Ry. Co.*, 8 N. W. 2d 460 (Minn.); *DeCamp* v. *Youngstown Municipal Ry. Co.*, 140 Ohio St. 376, 144 N. E. 128; *City and County of San Francisco* v. *Industrial Accident Comm.*, 61 Cal. App. 2d 248, 142 P. 2d 760; *Miceli* v. *Erie Railroad Co.*, 131 N. J. L. 427, 37 A. 2d 123; contra: *Kowalek* v. *New York Consolidated R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Tallan* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327); or (c) where the employee has no fixed work site and moves around from job to job (see cases cited *infra*, note 14, pp. 30–31).

was driving his own automobile and the employer in fact had no control over "his acts and movements." The opinion in the *Vochl* case contains not the slightest suggestion of a rule of law making "control" by the employer an essential condition for finding an injury to have arisen out of and in the course of employment.

The court below seemed to believe that control is necessary in order to establish a "causal connection" between the injury and the employment (R. 61). Cf. *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418. But, as the *Vochl* case shows, there may be an agreement between the employer and the employee "by which the service may be taken to begin earlier or elsewhere" than at the work site, so that "the hazards of the journey may properly be regarded as the hazards of the service" (288 U. S. at pp. 169–170). The mere fact that at the moment of the injury, during the journey to or from the work site, the employee is not actually doing the work he is primarily hired to do, or that his acts and movements are not subject to the employer's control, does not render him any less in the service of his employer. Cf. *Nierotko* v. *Social Security Board*, 327 U. S. 358. It is sufficient if he is engaged in an activity incidental to his employment. *Liberty Mutual Insurance Co.* v. *Gray*, 137 F. 2d 926 (C. C. A. 9); *Ward* v. *Cardillo*, 135 F. 2d 260, 264 (App. D. C.); *Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 Atl. 492.

The "control" test is not only at variance with the *Vochl* decision but its inadequacy is demonstrated by the many types of cases in which compensation is awarded even though the employer lacks "control." Injuries to "outside" employees, such as travelling salesmen, solicitors and policemen, while using the highway, are uniformly recognized as compensable. *Bennett* v. *Marine Works, Inc.*, 273 N. Y. 429, 7 N. E. 2d 847. Yet, in many such cases, the employer manifestly has no real or substantial control over either the employee's movements or his means of transportation. The same is true of cases in which an employee is injured on the highway while upon a "special mission" for his employer (*Gagnebin* v. *Ind. Acc. Comm.*, 140 Cal. App. 80, 34 P. 2d 1052; *Keely* v. *Metropolitan Edison Co.*, 41 A. 2d 420 (Pa. Super.)); or where the employee is being paid for travel time while going to or from work (*McKinney* v. *Dorlac*, 48 N. M. 149, 146 P. 2d 867; *Exelbert* v. *Klein & Kavanaugh*, 278 N. Y. S. 377, 243 App. Div. 839; *Western Pipe and Steel Co.* v. *Ind. Acc. Comm.*, 49 Cal. App. 2d 108, 121 P. 2d 35); or where the employee is injured shortly after boarding or leaving a vehicle supplied by the employer (*Ward* v. *Cardillo*, 135 F. 2d 260, and cases cited); or where the employee is injured in a traffic accident while approaching or departing from the premises of the employer (*Cudahy Packing*

Co. v. *Parramore,* 263 U. S. 418; *Weaver* v. *Tredegar Iron & Coal Co.,* [1940] A. C. 955).[5] In all of these situations, compensation is generally allowed even though control by the employer is, for all practical purposes, entirely absent.

If the control test is applied in transportation cases of this sort, it will often cause compensation to turn, not upon the nature of the employment, but upon such irrelevant considerations as whose vehicle the employee was riding in at the time of the injury. For example, in those cases where the employer bears the cost of transportation to and from work, the injury to the employee may occur while he is travelling (1) in his own vehicle; (2) in the vehicle of a fellow employee (who may or may not have made arrangements with the employer for such transportation); (3) in the employer's vehicle (with or without the driver being supplied by the employer); (4) in the vehicle of an independent contractor hired by the employer; or (5) in the vehicle of a common carrier.

[5] Apparently recognizing the difficulty of applying the "control" test to the situation presented in the *Cudahy* case, *supra*, the court below suggested that there "the employer's control * * * is implied" (R. 61–62). But in the *Cudahy* case, the injury to the employee occurred while he was driving to work on a public highway in the automobile of a fellow employee, and the employer certainly had no control over the employee or the vehicle in which he was riding. Thus, resort by the court below to the notion of "implied control" serves only to emphasize the unworkability of the "control" test.

Which of these situations would be excluded from compensation by applying the "control" test would, of course, depend upon how far one carries the notion of "control" to its logical conclusion. But it is clear that in at least some of these cases compensation would automatically be barred by the test.

Any such difference in treatment can find no support in the realities of workmen's compensation, or in the statutory policy of protecting workmen from those hazards which, as a practical matter, are incidental to their employment. It may well be that the mode of transportation in a particular case may illumine the nature of the employment agreement. But if in such a case it is concluded that the hazards of employment extend to transportation to and from work, so that "service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return" (*Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 170), the particular type of vehicle involved should in no way affect the compensability of the injury. No one would deny that the traveling salesman is entitled to receive the protection of workmen's compensation from the hazards of travel, whether his journey be in his own car, a common carrier or any other reasonable mode of transportation. The same should be true of any other type of employee

so long as the hazards of his employment extend to transportation to and from work.[6]

These considerations emphasize the undesirability of importing into the law of workmen's compensation the common-law rules of agency, and more particularly the so-called "control" test. The latter is at best a vague and indefinite standard which, if applied to the field of workmen's compensation, would inevitably introduce the same uncertainties that have long plagued the courts in dealing with the doctrine of *respondeat superior*, and would depart from the statutory policy of providing a "prompt" and "inexpensive" method for dealing with workmen's compensation claims. *Crowell* v. *Benson*, 285 U. S. 22, 45–47. As this Court pointed out in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 120–121, 125, the "so-called 'control test' with which common-law judges have wrestled to secure precise and ready applications", has a simplicity which is "illusory"; few "problems in the law have given greater variety of application and conflict in results"; and to "import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effective-

[6] Several states have by statute sought to deal with the going and coming problem. See Dodd, *Administration of Workmen's Compensation*, p. 684.

ness," would cause the administration of the statute to "become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts." The same would be true if the "control" test were imported wholesale into the Longshoremen's Act. Cf. *Hust* v. *Moore-McCormack Lines*, No. 625, last Term, decided June 10, 1945, slip opinion, pp. 12–13; *International Association of Machinists* v. *Labor Board*, 311 U. S. 72, 80.

It is true, as the respondents point out, that some state authorities seem to use the "control" test in "transportation" cases.[7] But it is noteworthy that in such jurisdictions only lip service

[7] *Guenesa* v. *Rulon, Inc.*, 124 Pa. Super. 569, 189 Atl. 524 (carfare); *Orsinie* v. *Torrance*, 96 Con. 352, 113 Atl. 924 (carfare); *Whitney* v. *Hazard Lead Works*, 105 Conn. 512, 136 Atl. 105 (injury on streetcar, employer paying monthly sum for maintenance of employee's automobile); *Republic Underwriters* v. *Terrell*, 126 S. W. 2d 752 (Tex. Civ. App.) (gasoline for employee's automobile); *Public Service Co. of No. Ill.* v. *Industrial Comm.*, 370 Ill. 334, 18 N. E. 2d 914 (allowance of 67 cents a day to cover cost of transportation; employees alternated in use of own automobiles); *Kerin* v. *Industrial Comm.*, 239 Wis. 617, 2 N. W. 2d 223 ($1.50 daily allowance for use of employee's automobile); *Baumbach* v. *Industrial Comm. of Ohio*, 59 Oh. App. 101, 17 N. E. 2d 389 (used own automobile, employer paying equivalent of bus fare); *Industrial Comm. of Ohio* v. *Heil*, 123 Ohio St. 604, 176 N. E. 458 (weekly allowance for transportation expense; employee used taxicab).

is sometimes paid to the doctrine;[8] and where, as here, there is an express agreement to provide transportation, the doctrine appears to be without force.[9] In other jurisdictions, the "control" test is completely rejected.[10] For the reasons already stated, we submit that the view taken in the latter jurisdictions is the sound one. And, if it is applied here, it will be in harmony with the principle that the District of Columbia Workmen's Compensation Act is to be liberally construed.[11] Of course,

[8] *Calif. Cas. Indem. Exch.* v. *Industrial Acc. Comm.*, 21 Cal. 2d 461, 132 P. 2d 815; *Konopka* v. *Jackson Co. Road Comm.*, 270 Mich. 174, 258 N. W. 429.

[9] *Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 Atl. 492; *Littlefield's Case*, 126 Me. 159, 136 Atl. 724; *see Kerin* v. *Industrial Comm.*, 239 Wis. 617, 2 N. W. 2d 223; *Kowalek* v. *New York Consol. R. Co.*, 229 N. Y. 489, 128 N. E. 888.

[10] *Lehigh Nav. Coal Co.* v. *McGonnell*, 120 N.J.L. 428, 199 Atl. 906 (cost of railroad commutation tickets); *Williams* v. *Trav. Ins. Co. of Hartford, Conn.*, 19 So. 2d 586 (La.) travelling expenses, employee using own automobile); *Turner, Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 490 (gas and oil for employee's automobile); see *Breland* v. *Traylor Engineering & Mfg. Co.*, 52 Cal. App. 2d 415, 126 P. 2d 455 (transportation allowance per mile, employee using own automobile); *Cary* v. *State Industrial Comm.*, 147 Okla. 162, 296 Pac. 385 (allowance for transportation expenses where work site was over 8 miles away); *Burchfield* v. *Department of Labor and Industries*, 4 P. 2d 858 (transportation allowance equal to bus fare; employee used own automobile).

[11] *Baltimore and Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408; *Fidelity and Casualty Co. of New York* v. *Burris*, 59 F. 2d 1042 (App. D. C.); *Associated General Contractors of America, Inc.* v. *Cardillo*, 106 F. 2d 327 (App. D. C.); *DeWald* v. *Baltimore & Ohio R. R. Co.*, 71 F. 2d 8[illegible] (C. C. A. 4), certiorari denied, 293 U. S. 581.

the presence or absence of "control" may be a relevant factor, to be considered along with all the other circumstances, in determining whether the injury arose "out of and in the course of employment." But it is the Deputy Commissioner who is charged by the Act with the duty of weighing all of the relevant factors in determining whether the injury occurred while the employee was engaged in an activity so intimately related to the employment that "the hazards of the journey may properly be regarded as hazards of the service" (*Voehl*, 288 U. S. at 170). "Considerations of proximity and degree are here, as so often in the law, decisive." *Freeman* v. *Hewit*, No. 3, this Term, decided December 16, 1946, slip opinion, p. 5. This Court has not undertaken to prescribe rules of law specifying the weight which must be given to any particular factor; and the Deputy Commissioner's conclusion should not be set aside if it has a reasonable basis in the record and is not at variance with established legal criteria.

B. THERE WAS AMPLE WARRANT IN THE RECORD FOR THE DEPUTY COMMISSIONER'S FINDING

There was ample evidence before the Deputy Commissioner to support his finding (R. 9) that Tiger's injury arose out of and in the course of his employment. From the general circumstances surrounding the employment, and the terms of the employment contract itself, there was sufficient basis for concluding, for purposes of workmen's compensation, that the transporta-

tion to and from work was an incident of the employment, and that Ticer's "service" commenced when he left his home and continued until his return.

1. The terms of the employment were governed by a long-standing agreement between Local Union No. 26, International Brotherhood of Electrical Workers (of which Ticer was a member) and the Institute of Electrical Contractors of the District of Columbia, Inc. (of which the employer was a member) (R. 52). The agreement expressly provided that "Transportation and any necessary expense such as board and lodging shall be furnished for all work outside the District of Columbia" (R. 53). This provision had been in the basic contract between the Union and the Institute for some fifteen years (R. 23–24). During this extended period, the manner in which the employer carried out this obligation varied with the circumstances surrounding the particular work project to which the employees were assigned. At times, the employer actually furnished the means of transportation, using its own cars and a station wagon (R. 31, 33). At other times, in lieu of supplying the transportation facilities, the employer paid the employees a money allowance to cover the cost of transportation (R. 17–18, 24). Where the latter course was followed, the written contract was not amended or changed in respect of the provisions governing transportation. The employer would

simply communicate with the Union to ascertain the amount necessary to defray the cost of transportation. (R. 24, 31.) The amount agreed upon affected all contractors in the local Institute, and bids of all employers were made after the cost of transportation had been ascertained (R. 22, 24, 31). With respect to the work at Quantico, $2.00 per day had been agreed upon as the transportation allowance (R. 20, 23). This amount was fixed after investigation into the cost of transportation by railroad (R. 22), and was paid to each employee, irrespective of his rate of pay (R. 39, 40), to cover the cost of daily transportation to and from Quantico (R. 30, 31, 34, 36, 38, 39).

The court below, apparently making its own findings of fact, held that the original agreement to furnish transportation "was not followed by the parties with respect to the work at Quantico" and that a "new" oral contract to pay the transportation expenses supplanted the written agreement (R. 61). There is no evidence in the record that, when the parties arranged for the payment of transportation expenses rather than the furnishing of actual transportation, they understood that they were entering into a new contract or amending the old one; and it is indeed difficult to discover the basis for the conclusion of the court below in this regard. Certainly the record

compelled no such conclusion, for it is reasonable to infer, as the Deputy Commissioner apparently did, that the arrangement for paying the employees $2.00 per day for transportation was merely an implementation of the agreement to furnish transportation. As already noted, the transportation provision in the contract between the Union and the Employer's Institute had been in effect for approximately fifteen years, and under that provision, the employers sometimes supplied the cost of transportation and at other times supplied the vehicle, depending upon the particular work project. Although other changes were made in the contract when it was renewed from year to year, no change was made in the transportation provision (R. 23). From this evidence, it is certainly reasonable to infer that, over the fifteen-year period in which the contract was in effect, the payment of the transportation expense was not a mere substitution of or variation from the contract, but was the carrying out of the contract itself; otherwise, the written contract provision undoubtedly would have been changed to accord with the substitute.

2. Aside from the express obligation to furnish transportation, the exigencies of the employment were such, by reason of the location of the work, the hours of work, and the inadequacy of public transportation facilities, as to require as a practical

matter that the employer make some arrangement for transportation if employes were to be obtained for the job. The employees generally worked from 7:30 a. m. until 4:30 p. m. (R. 40). Although there was train and bus service to a place called Triangle near Quantico, there was no such service to Quantico proper (R. 38, 39), and, in order to use public transportation, it would have been necessary for employees to arise at four o'clock in the morning (R. 27, 28), and then walk two to four miles at the Quantico end (R. 39). No public transportation to the job site was available (R. 38). Finally, the need for skilled men at Quantico was such that apparently the contractors would, if necessary, have paid Ticer $5.00 for daily transportation to get him to work (R. 27, 28). The transportation was obviously more than the normal travel of a worker from his home to his place of employment in the same locality. It was only such unusual transportation—outside the locality—for which the employer was required by the contract to pay.

3. Other conditions peculiar to the work at Quantico and Ticer's general employment relationship with the Ernst Company further demonstrate that his transportation to and from work was so closely related to his employment as fairly to be regarded, for purposes of workmen's compensation, as incidental to his employment. For

unlike any ordinary factory or office worker who has a fixed place of work, Ticer was akin to an "outside" worker who travels to different work sites. When first hired by the Ernst Company, some nine years before his injury,[12] Ticer was not hired to work on any particular project; he worked wherever he was needed on any of the employer's jobs (R. 30; Tr. 127).[13] When he was transferred from one job to another, the employer did not have to rehire him (R. 32). Thus upon his transfer to Quantico in November 1940, from a project in the District of Columbia (R. 35), there was no lapse in his employment and no necessity for a new contract of employment (R. 34, 36). At that time, the employer was engaged in some nine different projects at the Marine Base, the jobs being located at widely separated points on the post (Tr. 44–45, 66). Ticer worked on most of these jobs, and whenever he was shifted from one to the other, transportation was provided in the employer's truck (Tr. 66). The employer also had projects going on

[12] Ticer was regularly employed and had worked steadily for the Ernst Company for approximately nine years prior to his injury, except for a period of approximately six months in the year 1938 or 1939, when he went to work for the Federal Government (R. 8).

[13] As used in this brief, R. refers to the printed record; Tr. refers to the unprinted transcript of testimony on file in the Clerk's office, and, by stipulation of the parties, part of the record here (R. 65).

in the District of Columbia (Tr. 44; R. 33), so that while Ticer worked some three years at Quantico before his injury, he was at all times subject to being ordered to return for work in the District (R. 51; Tr. 107, 127). Indeed, at the time of his injury, one of the passengers in his car was a fellow employee who previously had been transferred from Quantico to Washington, for a few days (R. 46–47, 51). In this aspect of the employment, Ticer was an "outside" employee, hired to work at shifting work sites, so that his employment could be construed as extending not merely to the period spent at a particular work site, but also to the period spent in travelling to and from work.[14]

[14] Cf. *Williams* v. *Trav. Ins. Co. of Hartford, Conn.*, 19 So. 2d 586 (La.) (pine lumber inspector working at different places; used own automobile); *Turner, Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 490 (member of crew to fell timber at different sites; used own automobile); *Hohman* v. *George H. Soffel Co.*, 354 Pa. 31, 46 A. 2d 475 (foreman plumber with no fixed work site; used own automobile, employer paying expenses); *O. P. Skaggs Co.* v. *Nixon*, 101 Colo. 203, 72 P. 2d 1102 (attorney—executive, occasionally called to another city for consultation; used own automobile); *Burchfield* v. *Department of Labor & Industries*, 4 P. 2d 858 (Wash.) (stevedore working at different ports—used own automobile, employer paying an allowance equal to bus fare); *McKinney* v. *Dorlac*, 48 N. M. 149, 146 P. 2d 867 (plasterer, using own automobile, sent to job in another city; and employer paid for travel time; *Bennett* v. *Marine Works, Inc.*, 273 N. Y. 429, 7 N. E. 2d 847 (salesman and repairs supervisor who visited ships at docks in different cities and used rail transportation).

In the light of the employer's express obligation to furnish transportation, and in view of the nature and circumstances of Ticer's employment by the Ernst Company and his work at Quantico, we submit that the evidence abundantly justified the inference that Ticer's transportation to and from work was an incident of his employment, and that he was in the service of his employer while going to and from work. The Deputy Commissioner, therefore, was warranted in concluding that Ticer's injury, although occurring while on his way home from work, arose out of and in the course of his employment. Even if "more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner's finding that [Ticer] was acting in the course of his employment." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246.

II

THE DEPUTY COMMISSIONER PROPERLY FOUND THAT HE HAD JURISDICTION TO MAKE THE AWARD

In the courts below and before the Deputy Commissioner, the insurance carrier and the employer contended that, in view of the length of time Ticer worked in Virginia, and the occurrence of his injury there, the Deputy Commissioner was without jurisdiction to make the award (R.

4–5, 60, 13–13). The Deputy Commissioner, however, found that he had jurisdiction (R. 9), and was sustained in this regard by the district court (R. 12–13). The court below did not find it necessary to pass upon this question, since it disposed of the case on the ground that Ticer's injury did not arise out of and in the course of his employment.

In our view, the Deputy Commissioner's finding that he had jurisdiction was so clearly correct that it requires only summary treatment here. Like any other administrative finding, it should be accepted as final if supported by the evidence and in accordance with law. The Deputy Commissioner followed the plain command of the statute that it "shall apply in respect to the injury or death of an employee of an employer in the District of Columbia, *irrespective of the place where the injury or death occurs* * * *"[15] (Italics supplied; Appendix, *infra*, p. 37). Since Ticer was admittedly an employee of an employer in the District of Columbia, the statute plainly applies here.

In the court below, the employer and insurance carrier contended that where the injury to the employee occurs outside the District of Columbia, the District of Columbia Workmen's Compensa-

[15] The italicized clause, *supra*, was not in the original bill, but was added by the Senate Committee on the District of Columbia. S. Rep. No. 852 (70th Cong., 1st sess.), p. 1. The clause was not discussed in the Committee Reports or the debates.

tion Law can apply only if the "employee during the whole of the employment spent more time working within the District than he spent working outside of the District." The record, however, does not show that Ticer spent more time working outside the District than within the District.[16] But even if it did, that should not bar jurisdiction under the Act. To do so would require reading into the unequivocal language of the statute a qualification that has no basis in its legislative history. The result of any such limitation would be in conflict with the principle that the Act is to be given a liberal construction. *Baltimore and Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408; *Fidelity and Casualty Co. of New York* v. *Burris*, 59 F. 2d 1042 (App. D. C.); *Associated General Contractors of America, Inc.* v. *Cardillo*, 106 F. 2d 327 (App. D. C.); *DeWald* v. *Baltimore & Ohio R. R. Co.*, 71 F. 2d 810 (C. C. A. 4), certiorari denied, 293 U. S. 581. It was undoubtedly for such reasons that the court below has, in effect, declined in other cases to read into the statute the limitation sought here by the employer and insurance carrier. *B. F. Goodrich Co.* v. *Britton*, 139 F.

[16] For approximately three years prior to his injury, Ticer worked on his assignment in Quantico (R. 8–9). But he had been employed by the Ernst Company for approximately nine years prior to his injury (with the exception of a period of approximately six months, in the year 1938 or 1939), and during such entire period of employment he worked on projects in and around the District of Columbia (R. 7–8, 16, 32).

2d 362, 364 (App. D. C.); *Travelers Insurance Co.* v. *Cardillo and Beard*, 141 F. 2d 362 (App. D. C.); *Travelers Insurance Co.* v. *Cardillo and Lawrence*, 141 F. 2d 364 (App. D. C.).

Obviously, the extraterritorial provision in the statute is designed to cope with the special circumstances involved in providing adequate workmen's compensation for the District of Columbia. Since the District is essentially a city-state, it is inevitable that many workmen employed in the District by employers carrying on businesses here will have assignments in areas outside the geographical limits of the District. There is no reason why such workmen, when injured on an assignment outside the city, should be denied a remedy within the District, where their substantial business connections are located.

The application of the extraterritorial provision here raises no problem of due process or full faith and credit. It is well established that so long as a State has a legitimate interest in a given employment relationship, it may award compensation under its own law for an extraterritorial injury, although there may be another remedy elsewhere. Thus, in *Alaska Packers Association* v. *Industrial Commission*, 294 U. S. 532, an award of compensation under the California law, to a non-resident alien, for an injury in Alaska, was sustained by this Court, notwith-

standing that the only contact with California was that the contract of employment had been made in California, even though the entire work under the contract was to be performed outside California. Cf. *Pacific Employers Insurance Co.* v. *Industrial Acc. Commission*, 306 U. S. 493; *Bradford Electric Light Company, Inc.* v. *Clapper*, 286 U. S. 145. In the present case, the District of Columbia had a far more substantial interest in Ticer's employment. Ticer and his wife were residents of the District (R. 8–9); Ticer was hired in the District (R. 8); the employer had its place of business in the District and engaged in construction work in the District (R. 7); before the Quantico assignment, Ticer worked in the District (R. 8); while at Quantico, he was subject to orders from the District and subject to being transferred to the District (R. 51; Tr. 107, 127); he was transferred from Washington to Quantico without either loss of time or any new contract of employment (R. 34, 36); his pay was carried to him from the District or else paid to him in the District (R. 38); and he commuted between the District and Quantico (R. 8–9). In these circumstances, there can be no doubt that the District had a sufficient interest to make the award here; and the Deputy Commissioner's finding that he had jurisdiction was clearly correct.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the cause remanded with directions that the judgment of the District Court be affirmed.

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DECEMBER 1946.

APPENDIX

1. The Act of May 17, 1928 (District of Columbia Workmen's Compensation Law) (c. 612, 45 Stat. 600, D. C. Code, 1940, Title 36, c. 5, § 1) provides in part:

> SEC. 1.—The provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

2. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*) provides in part:

> SEC. 2. DEFINITIONS.—When used in this Act—
>
> * * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the

willful act of a third person directed against an employee because of his employment.

* * * * *

SEC. 3. COVERAGE—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

* * * * *

SEC. 19. (a) Subject to the provisions of

SEC. 20. PRESUMPTIONS.—In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

* * * * *

* * * * *

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

U. S. GOVERNMENT PRINTING OFFICE: 1948

No. 265

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

FRANK A. CARDILLO, Deputy Commissioner, United States Employees' Compensation Commission, *Petitioner*,

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC. AND VIRGINIA C. TICER.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENTS, LIBERTY MUTUAL INSURANCE COMPANY & E. C. ERNST, INC.

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IN THE

Supreme Court of the United States

No. 265.

OCTOBER TERM, 1946.

FRANK A. CARDILLO, Deputy Commissioner, United States Employees' Compensation Commission, *Petitioner*,

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC., AND VIRGINIA C. TICER.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

BRIEF FOR THE RESPONDENTS, LIBERTY MUTUAL INSURANCE COMPANY & E. C. ERNST, INC.

SUMMARY OF ARGUMENT.

1. This case was correctly decided by the United States Court of Appeals for the District of Columbia when it found that the death of the employee did not arise out of or in the course of his employment. The decisions of the courts are virtually unanimous in holding that where the employer

does not furnish the means of conveyance to and from the place of employment and the employee selects his own method of conveyance over which the employer has no control, there can be no compensation award for an injury sustained enroute either home or to work. The facts in this case cannot, through any interpretation, bring this injury within the narrow exceptions that are recognized to the broad general rule that injuries sustained on the way to and from work are not compensable.

As was pointed out in the opinion rendered in this case in the United States Court of Appeals for the District of Columbia (Rec. 61), throughout practically all of the decisions under the Workmen's Compensation Acts of the various states runs the thread of the employer's control over the employee as the distinguishing characteristic which indicates the existence of the relation of master and servant. In this case the employer was exercising no control over the decedent. The decedent had terminated his day's work and was proceeding on his own business at a time and by a means which he himself had freely chosen.

2. It is further the respondents' position that when the United States Court of Appeals for the District of Columbia interprets the Workmen's Compensation Act for the District of Columbia it is passing upon a matter of local concern. The expressed policy of the Supreme Court of the United States is not to disturb such a decision by the Court of Appeals for the District of Columbia unless egregious error has been committed.

3. In addition, it is the respondents' position that the Deputy Commissioner, U. S. Employees' Compensation Commission for the District of Columbia, had no jurisdiction to make an award in this case because the employee had been employed outside of the District of Columbia for over three years prior to the accident, and the injury occurred outside of the District of Columbia.

ARGUMENT.

1. The United States Court of Appeals for the District of Columbia was correct in holding that decedent's injury in no way arose out of or in the course of his employment. The uncontradicted facts, as shown throughout the record, were that the decedent had completely terminated his day's work, was in no way under the supervision or control of his employer, and was at the time of the accident exercising his free, unfettered choice of going where and doing what he pleased on his own time after his work day had completely terminated. He was miles removed from the situs of his job at the time of injury.

Certainly, it was not within the contemplation of Congress when it created a Workmen's Compensation Act for the District of Columbia to make employers in the District insurers of the safety of their employees twenty-four hours a day during periods when they were pursuing their own pleasures or affairs completely divorced from their work. Such a construction would make each employer a life and accident insurance company with all his employees as policyholders.

To urge that the death involved in the case at Bar is compensable under the Act, the petitioner takes the tenuous stand that a $2-per-day allowance made by the employer to all employees in lieu of furnishing actual transportation or transportation expense extended the coverage of the Act to employees while going to and from work. The respondents' position throughout this case in respect to the question raised by the petitioner in this appeal has been twofold:

> 1. That there is no evidence in the record to support a finding that the $2 per day paid to the employees on the Quantico job, where the decedent Ticer was working, was transportation expense.
>
> 2. That even if transportation expense had actually been paid to the decedent, Ticer, still this would not

have brought his injury within the provisions of the Workmen's Compensation Act.

There was nothing in the evidence to show that the $2 a day paid to the employees on the Quantico job was transportation expense. On the contrary, all of the evidence showed that the $2 bore no relation whatsoever to the actual transportation expense incurred by the employees. An employee who lived in Quantico and walked to work every day would receive an additional $2 per day just as an employee who lived in Rockville, Maryland, and traveled by rail every morning to the District and by car or bus to Quantico. There was not even the semblance of a relationship between the actual expense incurred by the employee going to and from the job and the amount actually paid. It is signally interesting to note that the co-employees who were riding with Ticer in his carpool at the time of the accident, and who did not use their cars in the pool, were paying him $1 a day for their transportation. (Rec. 47, 49) The testimony was that the contract to furnish transportation was not being followed at the time of Ticer's death, but that $2 was given each employee in lieu of furnishing transportation or transportation expense. (Rec. 26)

But even assuming that there was evidence to support a finding that the employer paid $2 a day to each employee as reimbursement for actual transportation expenses, still this would not in itself bring the employee "in the course of his employment" while going to and from work in a conveyance of his own choosing. This has been the ruling of virtually every court in the land that has passed on this question. A review of these decisions is in order.

The broad general rule that has been recognized in every jurisdiction in the country as applicable to injuries sustained going to and from work is very succinctly stated by the Supreme Court of the United States in *Voehl* v. *Indemnity Insurance Company*, 288 U. S. 162, 169, a case that is much relied on by petitioner. Here this Court stated:

> "The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment."

In the *Voehl* case the admitted facts were that the employee Voehl was in effect on twenty-four hour a day duty. He was subject to call at all times. At the time he sustained his injury, he was actually engaged in the business of his employer, and since he was actually on the business of his employer, he, of course, was subject to the control of his employer. The facts of the *Voehl* case are in direct antithesis to the facts in the case at Bar. It strains the imagination to fathom how petitioner can derive solace from the opinion rendered in that case. Voehl, at the time of his injury, was actually working for his employer. Ticer, at the time of his injury, had terminated his day's employment and was free to do and go as he pleased.

This Court took cognizance of the fact that Voehl's situation fell within one of the exceptions to the broad general rule by reason of the fact that he was on twenty-four hour a day duty when it said,

> "Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either expressed or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and, hence, within the purview of the Compensation Act."

The United States Court of Appeals for the District of Columbia in the case of *Ward* v. *Cardillo*, 135 Fed. 2d, 260, 262, defined and delimited the exceptions to the broad general rule laid down in the *Voehl* case, *supra*. It recognized

the rule of the *Voehl* case and adopted the following four exceptions to its application:

"1. Where the employment requires the employee to travel on the highway.

2. Where the employer contracts to and does furnish transportation to and from work.

3. Where the employee is subject to emergency calls as in the case of firemen.

4. Where the employee uses the highway to do something incidental to his employment with the knowledge and approval of the employer."

In every case where compensation has been allowed under the Act for an injury sustained by an employee who was going to or from work the facts can be fitted into one of these four exceptions. The *Voehl* case, *supra*, fits squarely within the third exception for Voehl was an employee who was on call twenty-four hours a day, subject to emergency duty, and this fact was the controlling factor in the decision of the Supreme Court of the United States as indicated by its opinion. The other cases under this Act which involved facts similar to the case at Bar all present situations which fit the cases into the clearly defined exceptions to the broad general rule. In *Employers' Liability Assurance Corporation* v. *Hoag*, 69 Fed. 2d, 227; *Standard Accident Insurance Company* v. *Hoag*, 66 Fed. 2d, 275; and *B. F. Goodrich Company* v. *Britton*, 139 Fed. 2d, 362, where compensation awards were sustained, each of the injured persons fell into the category of salesmen, and, therefore, within the first exception announced in the *Ward* case "where the employment requires the employee to travel on the highway."

In the *Ward* case, there was not only a contract to afford transportation to the employee but the employer did in fact convey the employee to and from his place of work in his the employer's car each day. It is to be noted that in the *Ward* case, the element of control of the employee by the employer is clearly present, inasmuch as transportation was afforded in the employer's own vehicle. Never has this

Court, or any court so far as we can determine, sustained a compensation award under facts like the facts in the case at Bar where the employer did not furnish the transportation and exercised no control over the means by which the employee came to and went from work. As the United States Court of Appeals for the District of Columbia said in its opinion in this case, (Rec. 61)

> "Throughout practically all the decisions we have examined, including those cited by the appellees, runs the thread of the employer's *control* over the employee as the distinguishing characteristic which indicates the existence of the relation of master and servant."

An analysis of the cases factually similar to the one at Bar indicates that the Court of Appeals for the District of Columbia was completely correct in the foregoing statement. The case of *Kerin* v. *Industrial Commission et al.*, 239 Wisc. 617, 2 N. W. 2(d) 223 (February 10, 1942), is identical in every respect with this case. In the *Kerin* case there was a contract between the employees' union and the employer whereby the employer agreed to furnish transportation, board and lodging to the employees who were engaged in work outside of the jurisdiction in which they resided. The employee, Kerin, lived in Sun Prairie, Wisconsin and worked as a journeyman electrician on a job of the employer in Evansville, Wisconsin. His work day was from 8:00 A. M., to 4:30 P. M., one-half hour for lunch, and he was paid for a 48 hour week at the rate of $1.38 per hour. In lieu of the agreement furnish the employees transportation, lodging and board, the employer paid each employee who was working on this job $1.50 per day over and above the fixed hourly wage. This was done so that the employees who desired might commute in their private automobiles to and from their place of work and use the $1.50 per day for gasoline expenses. Kerin availed himself of this right and drove each day in his own car to and from work, transporting some of his co-employees with him. On September 14, 1939, he left work between 4:30

P. M. and 4:45 P. M., and started for his home in Sun Prairie. While enroute home he was involved in a collision and killed.

The Compensation Commission for Wisconsin made an award to his widow. In holding this injury and death not compensable under the Workmen's Compensation Act the Supreme Court of Wisconsin had this to say:

> "A mere additional daily allowance to the employee which he is at liberty to use for board and room at his place of employment or for travel to and from work in the employee's car, does not extend the Compensation Act so as to cover the employee while commuting to and from work.
>
> In the instant case after quitting time at 4:30 P. M., Kerin had nothing to do for his employer until he returned to work the following morning at 8:00 A. M. In the interim the employer had no control over Kerin as to his means of transportation to and from his work, or in any other respect."

In *Public Service Company of Northern Illinois* v. *Industrial Commission, et al.*, 370 Ill. 334 (1939), 18 N. E. 2(d) 914, the employee Beckman worked in Niles Center, Illinois and lived in Blue Island, Illinois. Each day he commuted to and from work. He was allowed by his employer the sum of 67 cents a day to cover the cost of transportation. Just as did Ticer in the case at Bar, Beckman rode to and from work each day in a car pool with some co-employees. He was killed in a collision which occurred while he was driving home after completing his day's work and a compensation award was made to his widow.

In repudiating this award, the Supreme Court of Illinois held that Beckman could not conceivably be said to have been in the course of his employment at the time of the injury saying:

> "In the case before us, Beckman is not shown to have had any duties to perform away from the plant. Whether the 67 cents was wages or expense money is immaterial. His death did not arise out of or in the

course of his employment and his employer is, therefore, not liable."

In *Republic Underwriters v. Terrell, et al.*, 126 S. W. 2(d) 752 (1939) (Texas), the employee, Thomas Terrell, was employed by the Midway Refining Company in Goldsboro, Texas at the rate of $90.00 per month. Terrell lived in the town of Lawn, Texas. In addition to the $90.00 a month wages paid by the Midway Refining Company to Terrell, it supplied him with sufficient gasoline to transport him to and from his place of employment.

On June 13, 1936, Terrell left his home at Lawn at approximately 6:10 P. M., in order to reach work to begin his regular night shift at 7:00 P. M. While enroute to work he was in a collision and died as a result of the injuries sustained therein. The Deputy Commissioner found that he was in the course of his employment and made an award to his widow. This award was affirmed by the lower court. An appeal was taken by the employer. In reversing the lower court, the Court of Civil Appeals of Texas said:

> "In any event the appellees in the instant case seek to take this case out of what is called the general rule and bring it within that class of cases relating to the furnishing by the employer of the means of transportation to and from the place of work. As noted, the contention is predicated upon the fact that the employer furnished as a part of the contract of the employment the gasoline used by the employee in operating his automobile while driving from his home at Lawn to his place of work at Goldsboro, six miles away, and return. In other words, did the employer in providing the gasoline, furnish the employee transportation within the meaning of the so-called exception or under such terms and conditions as to bring the injury within the course of Terrell's employment.
>
> It is undisputed that Terrell owned the automobile. He had exclusive control over it at all times, and the employer had none. The employee's sole purpose in being at the point of injury was simply to reach the employer's premises for his own place of labor. It appears that the test of employer's liability in cases

where he provides transportation is that he has control and direction of the means and use thereof. By such control of the means of transportation, the employer can avoid departure from direct or designated routes and in the exercise of his control he may avoid extra hazards. . . .

After a careful consideration of the facts and circumstances surrounding the death of Terrell, we do not believe it would be a sound proposition of law to hold that he sustained his injuries in the course of his employment on the theory that his employer was furnishing him means of transportation over the highway at the time he met his death. This record presents no theory upon which the judgment can be sustained."

It is to be noted that the Texas Court expressly enunciates the rule that the test, the norm in determining whether an employee is acting "in the course of his employment", is whether or not the employer was exercising any degree of control over him. This is the test that is applied by all the Courts in making determinations of this nature, whether it is actually expressed or not. It is respectfully submitted that in every case where the employee is held to be "in the course of his employment" there is some degree of control being exercised over the employee's activities by the employer even if it be only designating the method of transportation to be used by the employee. But no Court has held an injury sustained when the employee is wholly free of control of the employer to be compensable.

In *Orsinie* v. *Torrance*, 96 Conn. 352, 113 A. 924, the claimant was employed as a laborer in the employer's plant about 7 miles from his home. He had finished work for the day, was waiting for a trolley car, changed his mind, and crossed the highway to get a ride on a truck and was injured. His contract of employment included a provision required by the labor union that because of the distance from work "the employer should either furnish transportation to and from the work or should add the cost of such transportation measured by the prevailing trolley fare to the agreed daily wage." The employer did not actually

provide or furnish the conveyance or means of transportation but added the trolley fare to the daily wage and included it in the weekly payroll. The employees could either walk, or ride in the trolley car, or could use their own cars. The Supreme Court of Errors of Connecticut held that the accident did not occur in the course of employment, stating as follows:

> "This statement of facts does not bring the case within the principles of *Swanson* v. *Latham and Crane*, 101 A. 492. In that case, furnishing of transportation by the employer was a part of the contract of employment, and the injury arose out of a hazard of the transportation which he furnished. In this case the employer did not furnish transportation. He did no more than to pay the wages which the rules of the labor union required him to pay. The fact that because of the location of the work, this wage included a sum measured by the cost of transportation by trolley to and from the work is of no more significance than if it had included a sum measured by the additional cost of food at that place. The claimant was left free to buy his own transportation or not. As soon as he left the employer's premises, the contract of employment ceased to operate directly or indirectly either as controlling his movements or as affecting the hazards to which he was subjected."

It is to be noted that petitioner has placed much reliance on *Swanson* v. *Latham and Crane*, 92 Conn. 87, 101 A. 492. The rule in Pennsylvania is in accord with our position in this case. In *Guenesa* v. *Eidon, Inc.*, 124 Pa. Super 569, 189 A. 524, the Court stated the general rule and exception as follows:

> "The general rule is that an employer is not liable for an accident occurring off its premises to an employee going to and from work.
>
> An exception to that rule is where *the facility for transporting the employee is provided* by the employer as a part of the agreement of employment and the transportation is for the interest of the employer as well as the employee." (Emphasis supplied.)

Then the Court in explaining that the exception did not apply to the case in question, said:

> "Here, while the employee was paid carfare in addition to his salary, the facility of transportation was not provided by the employer. It had no control or authority whatever over the train operated by the railroad company to accommodate the public."

It is to be noted that the Pennsylvania Court employs the "control" test also.

And, finally, in considering the circumstances of the employer paying the employee the amount of money to pay the fare, the Court said:

> "Had the employer paid to the employee in money the exact fare and he had purchased a ticket on which the return home was made, and the accident had occurred, the return would not have been in furtherance of the master's business."

The Court concluded by making an observation entirely pertinent to the status of Ticer in the case at Bar:

> "This claimant, as above stated, was employed for a definite time. Having finished his work for the day, he was a free agent; he could have returned to Philadelphia, or gone where he saw fit, as he was no longer that day in the service of defendant."

The New York cases have special significance with respect to this question, inasmuch as the Longshoremen's and Harbor Workers' Act was adopted from the New York Workmen's Compensation Act and the courts have repeatedly said that decisions under the New York Workmen's Compensation Law rendered prior to the enactment of the Longshoremen's and Harbor Workers' Act should be given weight in construing the provisions of the Longshoremen's and Harbor Workers' Act. *Case* v. *Pillsbury*, 148 F. 2d 392. *Terminal Shipping Company* v. *Branham*, 47 F. Sup. 561, armed 136 F. 2d 655. The leading case in New York on this question is Matter of *Kowalek* v. *New*

York Consolidated Railway Company, 229 N. Y. 489, 128 N. E. 888, decided before the Longshoremen's and Harbor Workers' Act.

In that case, the claimant was an employee of a railroad company and was permitted by his employer to ride to and from work upon the railroad cars free of charge. The employee was killed while on a station platform of his employer waiting for the train to take him home. The Court held that the claimant was not in the course of his employment because the company was indifferent as to the way or means by which the claimant reached the place where the day's work began. Furthermore, the danger to which the claimant was exposed at the time of the accident existed as to all persons who exercised the privilege of using the station. This use was neither connected with nor increased by the hazards of the actual duties of the employment. The claimant had the right to wait upon the platform and take the train to his home as a member of the public and the risks were those to which every person taking the train were subject. The risk as a passenger on the train was that to which the claimant would have been equally exposed apart from his employment. In concluding that the claimant's death did not result from an injury either (1) arising out of the employment, or (2) in the course of the employment, the Court said (p. 494):

> "The statute is not applicable to an injury which arises through a danger or hazard dissociated from or not inherent in the nature of the employment as its source and to which the employee would have been equally exposed apart from the employment. This conclusion is not affected by the fact that the employee would not, except for the employment, have been where such danger or hazard existed. An injury does not arise out of the employment unless the hazard causing it is, within rational apprehension, an attribute of or peculiar to the specific duties of the employment. The fact that the contract of employment exists, and necessitates the acts of performance, may or will occasion for the employee risks not reasonably incidental to the character of the work or employment. For the injuries

> caused by or flowing from those risks, the statute does not direct or permit compensation."

This case is directly analagous to the case at Bar: As far as the means by which Ticer reached the place of his employment were concerned, his employer was indifferent. True, it paid him extra compensation, but it did not either prescribe or furnish the actual means of transportation. When Ticer elected to use his own car upon the public highway, he exposed himself to a danger which existed as to all persons who used the highway for transportation. This danger was not connected with nor was it increased by the hazards of the actual duties of Ticer's employment, namely, working as an electrician at Quantico, Virginia. The hazards of going to and from work were those to which Ticer would have been equally exposed apart from his employment.

The next case in New York was *Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327, decided before the Longshoremen's & Harbor Workers' Act. In this case, the deceased, an employee of a subway company, was riding in one of his employer's trains on a pass to his place of employment at one of the defendant's stations. He was killed en route when two trains collided. In holding that the employee was not in the course of his employment, the Court pointed out that (p. 414):

> "* * * this case differs materially from those cases where the employer, in order to get his employees to and from their work, provides conveyances exclusively for their use which in no sense are public conveyances and in which the employees undertake to ride as part of their contract of employment in going to and from their work."

Thus, the New York Court emphasized that, in order to come within the exceptions of the general rule it is necessary to show that the employer provided conveyances exclusively for the use of the employees.

In Matter of *Keller* v. *Reis and Donovan, Inc.*, 195 A. D. 45, 185 N. Y. S. 741, decided before the Longshoremen's & Harbor Workers' Act, the claimant lived in New York City. His employer's general office was in Manhattan. It had a contract to do some work in a building situated in Newark, New Jersey, and it was necessary for the employee to travel from his home to New Jersey and back every day. The Court stated that the question involved in the case was this:

> "* * * this involves the question of whether an agreement regulating hours and conditions of labor entered into between a labor organization and employers can operate to give a compensable case where none would exist without it."

This agreement between the employer and union provided that an employee traveling beyond a certain, specified point in Manhattan would be compensated for his time while traveling beyond such area. In discussing the effect of this agreement, the Court said (p. 46):

> "But this agreement did not attempt to provide that the employer should become an insurer of the workman against the risks incident to travel upon the public highways . . . the whole purpose of the agreement was to equalize conditions of labor; to provide that the man going outside of the city district should not be obliged to give more time to the employment than those within the district."

And at page 48, the Court said:

> "From this analysis, it is evident that the contracting parties did not contemplate increasing the liabilities of the employer by commencing the employment before the claimant had reached the place of labor. There was no intention of making better conditions for those who went outside the city district than those who worked within the district; it merely protected the man going outside from the hardship of getting up early enough in the morning to reach his employment by eight o'clock. He was doing what his fellow-laborers did in substance when he reached the city district boundary at the time they were called upon to go to work

within that district, and beyond that he was allowed from his labor sufficient time to reach the place of employment without a sacrifice of any part of his day's wages. The agreement obviously sought an equalizing of the conditions of labor for the members of its union, with no purpose to change the provisions of the Workmen's Compensation Law in its relation to such members, and clearly no employer, acting freely, would enter into an agreement to become the insurer of his employees upon their way to work, for the very spirit of the statute is that it is to compensate for the accidents growing out of the employment, and which are properly chargeable against the industry as a part of the cost of production. The claimant may, for aught that we know, have a cause of action against the City of Newark for negligence in the care of its highways, but we are fully persuaded he has no claim against the enterprise conducted by his employer because of an accident happening to him upon the public highways of Newark, while he was doing no service for the employer."

And again in considering whether the accident "arose out of the employment", the Court said at page 49:

"The Act, to quote from a Massachusetts case, cited in Matter of *Alpert* v. *Powers* (223 N. Y. 97, 101), 'does not afford compensation for injuries or misfortunes, which merely are contemporaneous or coincident with the employment, or collateral to it. * * * The personal injury must be the result of the employment and flow from it as the inducing proximate cause. * * * The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being.' Nothing that the claimant was doing had any relation whatever to the employment; he was doing nothing for the employer. He was serving his own purpose of getting to the place of employment, under an agreement which protected him against loss of time, but which in nowise advanced the well-being of the employer, and the employment to which he was proceeding could in no possible sense be said to be a proximate cause of the accident."

It is interesting to note that the facts in the *Keller* case are identical with those in the case at Bar even to the point that Keller was an electrician and the union contract was with an electrical workers' union.

The rule is the same in Ohio (*Baumback* v. *Industrial Commission of Ohio*, 59 O. App. 101, 17 N. E. (2d) 389); Tennessee (*Norwood* v. *Tellico River Lumber Co.*, 146 Tenn. 682, 244 S. W. 490); Oregon (*In re Finley*, 141 Ore. 138, 16 Pac. (2d) 648); Kentucky (*State Highway Comm.* v. *Saylor*, 252 Ky. 743, 68 S. W. (2d) 26); *Gray* v. *Congleton*, 273 Ky. 716, 93 S. W. (2d) 829); Michigan (*Levchuk* v. *Kraft Cement Products Co.*, 246 Mich. 589, 225 N. W. 559); New York (*Schultz* v. *Champion Welding and Manufacturing Co.*, 230 N. Y. 309, 130 N. E. 304); Indiana (*Universal Portland Cement Co.* v. *Spirakis*, 79 Ind. App. 17, 137 N. E. 276); Utah (*Ogden Transit Co.* v. *Industrial Commission*, 95 Utah 66, 79 Pac. (2d) 17); Louisiana (*Taylor* v. *Gulf Refining Co.*, 11 La. App. 270, 122 So. 162).

Thus it is seen that in virtually every jurisdiction in the country, there are adjudications to the effect that in situations like the one at Bar there is no basis for award of compensation. The test that is applied most generally in determining whether or not an injury sustained by an employee going to and from work is within the course of his employment is whether the employer was in any degree exercising control over his movement at the time that the injury took place. If there is an element of control by the employer, the courts have generally found the injury to have arisen in the course of his employment. Thus, where the employer furnishes the means of transportation and operates it either himself or through an agent, the injury is a compensable one, but, where the employer merely adds some agreed stipend to the daily wage as a cover-all for transportation, leaving to the employee's discretion the means which he will utilize to get to and from work, there is no control over him, and, consequently, the Courts refuse to impute to the employer liability for injuries sustained under these conditions.

A contrary rule would lead to absurd results. If the employer could be held liable for injuries sustained to an employee going to and from work in his own vehicle, operated by himself, where could the line be drawn as to when he was in the course of his employment and when he was not? Would Ticer have been in the course of his employment if he stopped on the way home at a roadhouse to drink intoxicating beverages and remained there for an hour before resuming his trip home? Would Ticer have been in the course of his employment if the members of the car pool had stopped for a lengthy poker game at Quantico before starting home? What time limit would be given the "course of the employee's employment"? How long could he remain under the protection of the Compensation Act with the employer having no right of any kind to control his activities or conduct? To hold this case compensable would do violence to the whole spirit and intention of the Compensation Act. A situation of the kind presented here was clearly not within the comprehension or the contemplation of the legislators when the Act was written onto the books as law.

Every case where there has been an award to an employee for an injury sustained while going to and from work may be clearly placed in one of the four categories of the exceptions set out in the *Ward* case, *supra*. Never have the Courts departed from the broad classification of exceptions. But to allow compensation in the case at Bar would be to break down the presently existing structure of the Compensation law as clearly set out in the *Voehl* case, *supra*, and the *Ward* case, *supra*, and make the term "in the course of employment" so broad, comprehensive and nebulous as to defy further definition.

2. In 1928 the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, U. S. C. Title 33, Chapter 18, Section 901 et seq., was adopted by Congress as the Workmen's Compensation Act for the District of Columbia, (Act of May 17, 1928, 45 Stat. 600, Title 36, Section 501, D. C. Code, 1940 ed.) When Congress set up the Workmen's Compensation Act for the District of Co-

lumbia, it was passing a purely local act with purely local applicability. Just as the Longshoremen's and Harbor Workers' Act had been patterned after the New York Workmen's Compensation Act, so too, in effect, had the Workmen's Compensation Act for the District of Columbia been patterned after the Longshoremen's and Harbor Workers' Act.

In June of this year the Supreme Court of the United States had occasion to consider what authority it would exercise over the courts of the District of Columbia in the interpretation of local statutes. *Fisher* v. *United States*, No. 122, decided June 10, 1946. In the *Fisher* case the Court said (page 10),

> "Matters relating to law enforcement in the District are entrusted to the courts of the District. Our policy is not to interfere with the rules of law which they fashion save in exceptional situations where egregious error has been committed.
>
> "Where the choice of the Court of Appeals for the District of Columbia in local matters between conflicting legal conclusions seems nicely balanced, we do not interfere."

The Court then goes on to cite the cases of the *District of Columbia* v. *Pace*, 320 U. S. 698, 702 and *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-5.

It is respectfully submitted that in interpreting the local Workmen's Compensation Act the Court of Appeals for the District of Columbia was passing on a matter of purely local concern and made a choice between what petitioner in his brief concedes are conflicting legal conclusions with respect to the question presented in the case at Bar. In view of this expressed policy of the Supreme Court of the United States made time and again since the case of *Del Vecchio* v. *Bowers*, 296 U. S. 280, it is urged that the decision of the Court of Appeals for the District of Columbia should not be disturbed.

It is respondents' position that in *Del Vecchio* v. *Bowers* (*supra*) sufficient cognizance was not taken of the fact that

the Workmen's Compensation Act for the District of Columbia has a completely different application and comprehension from the Longshoremen's and Harborworker's Act. The latter, as the name implies, applies nationally to longshoremen and harborworkers alone. The Compensation Act for the District applies locally, to office workers, plumbers, clerks, drivers, bakers, electricians, carpenters, in short, to all types of employment. It is purely local in nature, and the policy of this Court toward interpretations of local statutes by the Court of Appeals for the District of Columbia should be given effect.

3. Respondents have taken the position throughout the proceedings in this case that the Deputy Commissioner, U. S. Employees' Compensation Commission for the District of Columbia, had no jurisdiction to make an award in this case because the employee had been employed outside of the District of Columbia for over three years prior to the accident and the injury occurred outside of the District of Columbia. The United States Court of Appeals for the District of Columbia in its decision in this case (Rec. 62) expressly stated that its view of the case made it "unnecessary to consider the question of jurisdiction." Since the lower court has not yet passed upon this question, respondents feel that the question is not properly before the Court at this time. But since the question is jurisdictional in nature and the Court may wish to consider it, respondents herein state their position in this matter.

The Workmen's Compensation Act for the District of Columbia (Act of May 17, 1928, 45 Stat. 600, Chapter 612, Title 36, Section 501, D. C. Code, 1940 ed.) states that its provisions

> "shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury occurred; except that in applying such provisions, the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia and the term 'employee' shall be held to mean every employee of any such person."

At first blush, the jurisdictional connotation of this Act is sweeping in its comprehension. However, the most cursory reflection suffices to demonstrate that the intention of the legislators could not have been as broad as this, that there must be some more definite criteria delimiting the jurisdiction of the District of Columbia in Compensation cases than what is stated on the face of the Statute.

As Mr. Justice Frankfurter stated in his dissenting opinion in *United States* v. *Monia*, 317 U. S. 424, 431—"The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious over-simplification."

If the meaning of the above quoted Statute were what is gleaned from a casual and superficial reading of it, it would be a violent denial of substantive due process of law and wholly invalid, for it would mean that a man who lived in Mississippi, for example, where there is no Workmen's Compensation Act and who was hired in Mississippi and who was subsequently injured in that State while working for his employer, could come into the District of Columbia and be given an award of compensation under the District of Columbia Act merely because his employer maintained an office here and had an employee here. Thus, for example, a Mississippi employee of General Electric Company who had never left his own State and who was not entitled to compensation under the laws of his own State could come to the District of Columbia and gain an award under the District of Columbia Act if he were injured while working simply because General Electric has an office and has employees here. The mere suggestion of this situation suffices to show that this could not have been the intention of Congress and that there must be further implied jurisdictional criteria.

Petitioner in his brief cites the cases of *B. F. Goodrich* v. *Britton*, 139 F. 2nd 362, *Travelers Insurance Company* v. *Cardillo and Beard*, 141 F. 2nd 362 and *Travelers Insurance Company* v. *Cardillo and Lawrence*, 141 F. 2d 364, all of which were decided by the Court of Appeals for the

District of Columbia and discussed the jurisdictional aspects of the District of Columbia Workmen's Compensation Act.

The test laid down by the Court in the *Goodrich* case (with reference to the employee's status) is whether a particular person was at the time of the injury an employee *within the District* in the carrying on of the business. In that case, the Court held that the claimant was such an employee because

1. The employee's office was in the District even though his selling contacts were largely outside;
2. The employee's time was nearly equally divided between work inside the District and outside the District and the work in each case was an essential part of the work in the other place since each, in its natural sequence, depended upon the other.

Thus, the rule established by the *Goodrich* case is that where a salesman, in the year preceding the accident, spent 134 working days in the Washington, D. C. office of his employer and 135 working days traveling outside the District selling his employer's products and was injured in the course of his employment outside of the District, the District of Columbia Compensation Commission properly had jurisdiction of his claim for compensation. The factual criteria authorizing the assumption of jurisdiction were: 1. Office in the District; 2. Half of the yearly working days spent in his office in the District; 3. The work outside being dependent upon the work inside and vice versa.

In the *Beard* case, the claimant, a carpenter, was hired by the employer in April, 1940. From that date until July, 1941 (a year and three months), he worked on construction jobs for the employer always in the District of Columbia. From July, 1941, to November, 1941 (a period of four months), he worked on jobs for his employer in Maryland and Virginia. He was injured in November, 1941, while working in the State of Maryland.

Upon this state of facts, the Court held that the claimant was an employee of an employer carrying on an employment in the District, and that, under the *Goodrich* case, the claim was within the jurisdiction of the District of Columbia Act. The Court did not discuss what facts made the employee "an employee within the District" as it did in the *Goodrich* case. So we can only assume that the Court, in holding that where, for seventeen months preceding the accident there is an employment of thirteen months within the District and four months outside the District, there is sufficient employment within the District to justify the assumption that the claimant was an employee within the District.

In the *Laurence* case, the claimant, again a carpenter, was hired by the employer in the District of Columbia in September, 1941, and worked there for about six weeks. He left his employer for awhile, but returned to work on January 13, 1942; and worked in the District until January 20, 1942, making a total of seven weeks' employment within the District. From January 21, 1942, until the day of the accident, February 13, 1942, a period of about three weeks, he worked for the employer outside of the District, where he was injured. Thus, in this case, the Court held that the employee was "an employee within the District", apparently because during a period of ten weeks immediately prior to the accident, he was employed for seven weeks within the District and three weeks outside of the District.

In the case at Bar, the Deputy Commissioner has found as a fact that Ticer was first hired by his employer in about 1934; there is no finding concerning the location at which Ticer worked from 1934 to 1940; in 1940, Ticer worked for the employer in the District of Columbia (presumably for a period of ten months); in November, 1940, Ticer was sent by the employer to a construction job in Quantico, Virginia, which employment continued in Virginia from November, 1940, to December, 1943, a period of over three years.

The question, therefore, to be decided by this Court if the jurisdictional question is considered is as follows:

> Is an employee of a District of Columbia employer an employee within the District in the carrying on of the business, who, for over three years prior to the happening of the accident, was employed as an electrician on a construction job for the employer in the State of Virginia, and who, at no time during that period, did anything for the employer in the District.

The Court of Appeals for the District of Columbia extended its holding in the *Goodrich* case when it decided the *Beard and Lawrence* cases to be compensable. The only basis for extending jurisdiction in the latter cases seems to be that the employee spent more time in the District than he did outside. If the criterion for jurisdiction is whether the employee, during the whole of the employment, spent more time working within the District than he spent working outside of the District, then the claimant in the case at Bar must be denied compensation, for during Ticer's last period of employment he had only a short time here and over three years in Virginia.

Petitioner lays much emphasis on the case of *Alaska Packers' Association vs Industrial Accident Commission of California*, 294 U. S. 532, in discussing the jurisdictional point. In this case the injured employee had left the State of California less than three months before his injury. He had entered into an employment contract in California and was to do work of only a seasonal nature in Alaska, whereas, the injured employee in the case at Bar had been engaged in work in the State of Virginia for a period of three years.

It is respectfully submitted to the Court that it was never the intention of Congress to make the District of Columbia Act applicable to a situation such as the one at Bar and that there was no jurisdiction whatsoever for making an award in this case.

CONCLUSION

For the foregoing reasons, it is further respectfully submitted that the judgment of the United States Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 265.—October Term, 1946.

Frank A. Cardillo, Deputy Commissioner, United States Employees' Compensation Commission, Petitioner, *v.* Liberty Mutual Insurance Company, E. C. Ernst, Inc., and Virginia C. Ticer.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[March 10, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

Petitioner, Deputy Commissioner of the United States Employees' Compensation Commission, issued an order under the District of Columbia Workmen's Compensation Act [1] awarding compensation to the widow of one Clarence H. Ticer. It was specifically found that the injury which led to Ticer's death "arose out of and in the course of the employment." The propriety and effect of that finding are the main focal points of our inquiry in this case.

Section 1 of the District of Columbia Workmen's Compensation Act provides in part that "The provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act,' . . . shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs." The Longshoremen's and Harbor Workers' Compensation Act,[2] § 2 (2), in turn defines the term "injury" to include

[1] Act of May 17, 1928, 45 Stat. 600, D. C. Code, 1940, Title 36, Chap. 5, § 1.

[2] Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. § 901 *et seq.*

"accidental injury or death arising out of and in the course of employment. . . ." A finding that the injury or death was one "arising out of and in the course of employment" is therefore essential to an award of compensation under the District of Columbia Workmen's Compensation Act.

In support of his order in this case the Deputy Commissioner made various findings of fact. These may be summarized as follows:

Ticer and his wife were residents of the District of Columbia. He had been regularly employed since about 1934 [3] as an electrician by E. C. Ernst, Inc., a contractor engaged in electrical construction work in the District of Columbia and surrounding areas. In November, 1940, Ticer was transferred by his employer from a project in the District of Columbia to a project at the Quantico Marine Base at Quantico, Virginia. His work at the Marine Base continued for over three years until the time of his injury in December, 1943.

There was in effect at all times an agreement between the electrical workers' union and the employer. Section 15 (b) of this agreement provided that "Transportation and any necessary expense such as board and lodging shall be furnished [by the employer] for all work outside the District of Columbia." The sum of $2 a day was fixed by the parties to this agreement as transportation expense and represented the approximate cost of travel from the District of Columbia to the Quantico Marine Base and return. This sum was paid to Ticer and others in addition to the regular hourly rate of pay. And it was paid in lieu of the employer's furnishing transportation.

Because the job site at the Marine Base was several miles away from the Quantico bus or train terminal, it was necessary for Ticer and his co-workers to drive their own automobiles to and from work. The employees formed

[3] There was one exception. For a period of about 6 months in 1938 or 1939 he worked for the United States Government.

a car pool. Each morning they started from their respective homes in their own automobiles and drove to a designated meeting place at Roaches Run, Virginia. From that point they would proceed in one car to the job site at the Marine Base. This procedure was repeated in reverse in the evening. The workers alternated in the use of the cars between Roaches Run and the job site. Non-members of the car pool each paid the car owner $1 for the round trip.

The employer was aware of the means of transportation being used and acquiesced therein. On December 13, 1943, Ticer was driving his car on a direct route from his place of employment to his home, following the close of the day's work. Four co-workers were riding with him, two of them being non-members of the car pool. As the car approached Fort Belvoir, Virginia, a large stone, which came from under the rear wheel of a passing truck, crashed through the windshield of the car. It struck Ticer's head, crushing his skull. Death resulted four days later.

Ticer's widow presented a claim for compensation. At the hearing before the Deputy Commissioner, the employer and the insurance carrier contended that the Virginia Compensation Commission had sole jurisdiction over the claim and that Ticer's injury did not arise out of or in the course of his employment. The Deputy Commissioner ruled against these contentions. After making the foregoing findings, he entered an order awarding death benefits and funeral expenses to the claimant.

The employer and the insurance carrier then brought this action in the District Court to set aside the order of the Deputy Commissioner. They renewed their jurisdictional objection and alleged a lack of substantial evidence to support the finding that Ticer's injury arose out of and in the course of his employment. The District Court dismissed the complaint, holding that the Deputy Commissioner's findings were supported by evidence in the record

and that the compensation order was in all respects in accordance with law. On appeal, the Court of Appeals for the District of Columbia reversed, one justice dissenting. 154 F. 2d 529. Without passing upon the jurisdictional issue, the court held that Ticer's injury had not arisen out of and in the course of his employment. It felt that Ticer had become entirely free of his employer's control at the close of the day's work at the Marine Base and that he had thereafter assumed his own risk in subjecting himself to the hazards of the highway. We granted certiorari on a petition alleging a conflict with the decision of this Court in *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162.

As noted, the Court of Appeals deemed it unnecessary to dispose of the question whether the Deputy Commissioner had jurisdiction over the instant claim. But in reviewing an administrative order, it is ordinarily preferable, where the issue is raised and where the record permits, an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute. At the same time, however, it is needless to remand this case to the Court of Appeals for a determination of the jurisdictional issue. That issue was considered and determined by the Deputy Commissioner, who was in turn sustained by the District Court. The facts pertinent to that issue are not seriously disputed and the matter has been fully briefed and argued before us. A remand under such circumstances is not warranted. We accordingly turn to a consideration of the jurisdictional issue.

We are aided here, of course, by the provision of § 20 of the Longshoremen's Act that, in proceedings under that Act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary"—a provision which applies with equal force to proceedings under the District of Columbia Act. And the Deputy Commissioner's findings as to jurisdiction are entitled to great weight and will be rejected only where there is apparent error. *Davis* v.

Department of Labor, 317 U. S. 249, 256–257. His conclusion that jurisdiction exists in this case is supported both by the statutory provisions and by the evidence in the record.

The jurisdiction of the Deputy Commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it "shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term 'employer' shall be held to mean every person carrying on any employment in the District of Columbia, and the term 'employee' shall be held to mean every employee of any such person." There is no question here but that Ticer was employed by a District of Columbia employer; the latter had its place of business in the District and engaged in construction work in the District, as well as in surrounding areas. But the contention is made that, despite the broad sweep of the statutory language, the Act applies only where the employee, during the whole of his employment, spent more time working within the District than he spent working outside the District. Using that criterion, it is said that the Act is inapplicable to this case since Ticer was employed on a construction job in Virginia continuously for over three years prior to the accident and did nothing within the District for his employer during that period. The implication is that only the Virginia workmen's compensation law is applicable.

But the record indicates that both Ticer and his wife were residents of the District. He had been hired in the District by his employer in 1934 and had worked on various projects in and around the District from that time until 1940, when he was assigned to the Quantico Marine Base project. While at the Marine Base, he was under

orders from the District and was subject to being transferred at anytime to a project in the District. His pay was either carried to him from the District or was given to him directly in the District. And he commuted daily between his home in the District and the Marine Base project.

We hold that the jurisdictional objection is without merit in light of these facts. Nothing in the history, the purpose or the language of the Act warrants any limitation which would preclude its application to this case. The Act in so many words applies to every employee of an employer carrying on any employment in the District of Columbia, "irrespective of the place where the injury or death occurs." Those words leave no possible room for reading in an implied exception excluding those employees like Ticer who have substantial business and personal connections in the District and who are injured outside the District. Whether this language covers employees who are more remotely related to the District is a matter which we need not now discuss and any arguments based upon such hypothetical situations are without weight in this case.

Nor does any statutory policy suggest itself to justify the proposed exception. A prime purpose of the Act is to provide residents of the District of Columbia with a practical and expeditious remedy for their industrial accidents and to place on District of Columbia employers a limited and determinate liability. See *Bradford Elec. Co. v. Clapper*, 286 U. S. 145, 159. The District is relatively quite small in area; many employers carrying on business in the District assign some employees to do work outside the geographical boundaries, especially in nearby Virginia and Maryland areas. When such employees reside in the District and are injured while performing those outside assignments, they come within the intent and design of the statute to the same extent as those whose work and

injuries occur solely within the District. In other words, the District's legitimate interest in providing adequate workmen's compensation measures for its residents does not turn on the fortuitous circumstance of the place of their work or injury. Nor does it vary with the amount or percentage of work performed within the District. Rather it depends upon some substantial connection between the District and the particular employee-employer relationship, a connection which is present in this case. Such has been the essence of prior holdings of the Court of Appeals. *B. F. Goodrich Co. v. Britton*, 139 F. 2d 362; *Travelers Ins. Co.* v. *Cardillo*, 141 F. 2d 362; *Travelers Ins. Co.* v. *Cardillo*, 141 F. 2d 364. And as so applied, the statute fully satisfies any constitutional questions of due process or full faith and credit. *Alaska Packers Assn.* v. *Industrial Accident Commission*, 294 U. S. 532. Cf. *Bradford Elec. Co.* v. *Clapper*, *supra*.

Hence we conclude that the Deputy Commissioner had jurisdiction under the District of Columbia Act to entertain a claim by the widow of an employee who had been a resident of the District, who had been employed by a District employer and who had been subject to work assignments in the District. We accordingly turn to a consideration of the propriety and effect of the Deputy Commissioner's finding that Ticer's injury arose out of and in the course of his employment.

Our approach to that problem grows out of the provisions of the Longshoremen's Act, as made applicable by the District of Columbia Act. Section 19 (a) of the Longshoremen's Act provides for the filing of a "claim for compensation" and specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Thus questions as to whether an injury arose out of and in the course of employment necessarily fall within the scope of the Deputy Commissioner's authority. Section 21 (b) then provides

that compensation orders may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law."

In determining whether a particular injury arose out of and in the course of employment, the Deputy Commissioner must necessarily draw an inference from what he has found to be the basic facts. The propriety of that inference, of course, is vital to the validity of the order subsequently entered. But the scope of judicial review of that inference is sharply limited by the foregoing statutory provisions. If supported by evidence and not inconsistent with the law, the Deputy Commissioner's inference that an injury did or did not arise out of and in the course of employment is conclusive. No reviewing court can then set aside that inference because the opposite one is thought to be more reasonable; nor can the opposite inference be substituted by the court because of a belief that the one chosen by the Deputy Commissioner is factually questionable. *Voehl* v. *Indemnity Ins. Co., supra,* 166; *Del Vecchio* v. *Bowers,* 296 U. S. 280, 287; *South Chicago Co.* v. *Bassett,* 309 U. S. 251, 257–258; *Parker* v. *Motor Boat Sales,* 314 U. S. 244, 246; *Davis* v. *Department of Labor, supra,* 256.

It matters not that the basic facts from which the Deputy Commissioner draws this inference are undisputed rather than controverted. See *Boehm* v. *Commissioner,* 326 U. S. 287, 293. It is likewise immaterial that the facts permit the drawing of diverse inferences. The Deputy Commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court. *Del Vecchio* v. *Bowers supra,* 287. Moreover, the fact that the inference of the type here made by the Deputy Commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review. *Labor*

Board v. *Hearst Publications*, 322 U. S. 111, 131; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119, 124; *Unemployment Compensation Commission* v. *Aragan*, 329 U. S. —— (slip opinion, p. 9). Even if such an inference be considered more legal than factual in nature, the reviewing court's function is exhausted when it becomes evident that the Deputy Commissioner's choice has substantial roots in the evidence and is not forbidden by the law. Such is the result of the statutory provision permitting the suspension or setting aside of compensation orders only "if not in accordance with law."

Our attention must therefore be cast upon the inference drawn by the Deputy Commissioner in this case that Ticer's injury and death did arise out of and in the course of his employment. If there is factual and legal support for that conclusion, our task is at an end.

A reasonable legal basis for the Deputy Commissioner's action in this respect is clear. The statutory phrase "arising out of and in the course of employment," which appears in most workmen's compensation laws, is deceptively simple and litigiously prolific.[4] As applied to injuries received by employees while traveling between their homes and their regular places of work, however, this

[4] "The few and seemingly simple words 'arising out of and in the course of the employment' have been the fruitful (or fruitless) source of a mass of decisions turning upon nice distinctions and supported by refinements so subtle as to leave the mind of the reader in a maze of confusion. From their number counsel can, in most cases, cite what seems to be an authority for resolving in his favour, on whichever side he may be, the question in dispute." Lord Wrenbury in *Herbert* v. *Fox & Co.* [1916] 1 A. C. 405, 419. See also Dodd, Administration of Workmen's Compensation (1936), pp. 680–687; Horovitz, "Modern Trends in Workmen's Compensation," 21 Ind. L. J. 473, 497–564; Horovitz, Injury and Death Under Workmen's Compensation Laws (1944), pp. 93–173; Brown, "'Arising out of and in the course of the employment' in Workmen's Compensation Laws," 7 Wis. L. Rev. 15, 67, 8 Wis. L. Rev. 134, 217.

phrase has generally been construed to preclude compensation. *Voehl* v. *Indemnity Ins. Co., supra,* 169. Such injuries are said not to arise out of and in the course of employment; rather they arise out of the ordinary hazards of the journey, hazards which are faced by all travelers and which are unrelated to the employer's business. But certain exceptions to this general rule have come to be recognized. These exceptions relate to situations where the hazards of the journey may fairly be regarded as the hazards of the service. They are thus dependent upon the nature and circumstances of the particular employment and necessitate a careful evaluation of the employment terms.

Under the District of Columbia Workmen's Compensation Act, at least four exceptions have been recognized by the Court of Appeals: (1) where the employment requires the employee to travel on the highways; (2) where the employer contracts to and does furnish transportation to and from work; (3) where the employee is subject to emergency calls, as in the case of firemen; (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of the employer. *Ward* v. *Cardillo,* 135 F. 2d 260, 262. See also *Lake* v. *Bridgeport,* 102 Conn. 337, 128 A. 782. In performing his function of deciding whether an injury, incurred while traveling, arose out of and in the course of employment, the Deputy Commissioner must determine the applicability of these exceptions to the general rule. Here he decided that the second exception was applicable, that Ticer's employer had contracted to furnish transportation to and from work and had paid the expense of transportation in lieu of actually supplying the transportation itself. We cannot say that he was wrong as a matter of law.

There are no rigid legal principles to guide the Deputy Commissioner in determining whether the employer con-

tracted to and did furnish transportation to and from work. "No exact formula can be laid down which will automatically solve every case." *Cudahy Packing Co. v. Parramore*, 263 U. S. 418, 424; *Voehl v. Indemnity Ins. Co., supra*, 169. Each employment relationship must be perused to discover whether the employer, by express agreement or by a course of dealing, contracted to and did furnish this type of transportation. For that reason it was error for the Court of Appeals in this case to emphasize that the employer must have control over the acts and movements of the employee during the transportation before it can be said that an injury arose out of and in the course of employment. The presence or absence of control is certainly a factor to be considered. But it is not decisive. An employer may in fact furnish transportation for his employees without actually controlling them during the course of the journey or at the time and place where the injury occurs. *Ward v. Cardillo, supra.* And in situations where the journey is in other respects incidental to the employment, the absence of control by the employer has not been held to preclude a finding that an injury arose out of and in the course of employment. See *Cudahy Packing Co. v. Parramore, supra; Voehl v. Indemnity Ins. Co., supra.*[5]

Indeed, to import all the common law concepts of control and to erect them as the sole or prime guide for the Deputy Commissioner in cases of this nature would be to encumber his duties with all the technicalities and unrealities which have marked the use of those concepts in other fields. See *Labor Board v. Hearst Publications, supra*, 120–121, 125; *Hust v. Moore-McCormack Lines*, 328 U. S. 707, 723–725. That we refuse to do. "The

[5] See also *Gagnebin v. Ind. Acc. Comm.*, 140 Cal. App. 80, 34 P. 2d 1052; *Keely v. Metropolitan Edison Co.*, 157 Pa. Super. 63, 41 A. 2d 420; *McKinney v. Dorlac*, 48 N. M. 149, 146 P. 2d 867; *Exelbert v. Klein & Kavanaugh*, 278 N. Y. S. 377, 243 App. Div. 839.

modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common law liability of the master for personal injuries to a servant, leaving of necessity a field of debatable ground where a good deal must be conceded in favor of forms of legislation, calculated to establish new bases of liability more in harmony with these changed conditions." *Cudahy Packing Co.* v. *Parramore, supra*, 423.

Nor is there any other formal principle of law which would invalidate the choice made by the Deputy Commissioner in this instance. The fact that Ticer was not being paid wages at the time of the accident is clearly immaterial. *Cudahy Packing Co.* v. *Parramore, supra.*[6] And it is without statutory consequence that the employer here carried out his contract obligation to furnish actual transportation by paying the travel costs and allowing the employees like Ticer to make the journey by whatever means they saw fit. To be sure, there are many holdings to the effect that, where the employer merely pays the costs of transportation, an injury occurring during the journey does not arise out of and in the course of employment; there must be something more than mere payment of transportation costs.[7] But assuming those holdings

[6] "Nor is it ['in the course of employment'] limited to the time for which wages are paid. Indeed the fact that the workman is paid wages for the time when the accident occurs is of little, if any, importance." Bowlen, "A Problem in the Drafting of Workmen's Compensation Acts," 25 Harv. L. Rev. 328, 401, 402. *Turner Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 490.

[7] *Public Sevice Co. of Northern Illinois* v. *Industrial Commission*, 370 Ill. 334, 18 N. E. 2d 914; *Guenesa* v. *Ralph V. Rulon, Inc.*, 124 Pa. Super. 569, 189 A. 524; *Republic Underwriters* v. *Terrell*, (Tex. Civil App.) 126 S. W. 2d 752; *Orsinie* v. *Torrance*, 96 Conn. 352, 113

to be correct and assuming the Deputy Commissioner's findings in this case to be justified, there is more here than mere payment of transportation costs. It was found that Ticer's employer paid the costs as a means of carrying out its contract obligation to furnish the transportation itself. Where there is that obligation, it becomes irrelevant in this setting whether the employer performs the obligation by supplying its own vehicle, hiring the vehicle of an independent contractor, making arrangements with a common carrier, reimbursing employees for the use of their own vehicles, or reimbursing employees for the costs of transportation by any means they desire to use. In other words, where the employer has promised to provide transportation to and from work, the compensability of the injury is in no way dependent upon the method of travel which is employed.[8] From the statutory standpoint, the employer is free to carry out its transportation obligation in any way the parties desire; and the rights of the employees to compensation are unaffected by the choice made.

Turning to the factual support for the Deputy Commissioner's inference that Ticer's injury arose out of and

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A. 924; *Kowalek* v. *New York Consolidated R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Tallon* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327; *Keller* v. *Reis & Donovan, Inc.*, 185 N. Y. S. 741, 195 App. Div. 45; *Levchuk* v. *Krug Cement Products Co.*, 246 Mich. 589, 225 N. W. 559. See annotations in 20 A. L. R. 319, 49 A. L. R. 454, 63 A. L. R. 469, 87 A. L. R. 250, 100 A. L. R. 1053. Cf. *Netherton* v. *Coles*, [1945] 1 All E. R. 227.

[8] See *In re Donovan*, 217 Mass. 76, 104 N. E. 431; *Breland* v. *Traylor Engineering & Mfg. Co.*, 52 Cal. App. 2d 415, 126 P. 2d 455; *Lehigh Nav. Coal Co.* v. *McConnell*, 120 N. J. L. 428, 199 A. 906; *Burchfield* v. *Department of Labor and Industries*, 165 Wash. 106, 4 P. 2d 858; *Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 A. 492; *Cary* v. *State Industrial Commission*, 147 Okla. 162, 296 P. 385; *Williams* v. *Travelers Ins. Co. of Hartford, Conn.*, (La. App.) 19 So. 2d 586; *Turner Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 489.

in the course of employment, we find ample sustaining evidence. Ticer's employment was governed by the terms of a long-standing agreement between Local Union No. 26, International Brotherhood of Electrical Workers (of which Ticer was a member) and the Institute of Electrical Contractors of the District of Columbia, Inc. (of which the employer was a member). Rule 15 (b) of the agreement provided that "Transportation and any necessary expense such as board and lodging shall be furnished for all work outside the District of Columbia."

The employer carried out in different ways this obligation to furnish transportation. On certain construction jobs in the past, it actually furnished a station wagon or a passenger car of its own to transport the employees. At other times, however, it paid the employees an allowance to cover the cost of transportation in lieu of furnishing an automobile. Where the latter course was followed, the written contract was not amended or changed in any way, the employer simply communicating with the union to ascertain the amount necessary to defray the cost of transportation. The amount agreed upon affected all contractors in the Institute; and the cost of transportation was determined before the contractors made their respective bids.

On the Quantico Marine Base project, the sum of $2 per day was agreed upon as the transportation allowance in lieu of furnishing an automobile. This amount was fixed after investigation into the cost of transportation by railroad and was paid to each employee, irrespective of his rate of pay, to cover the cost of transportation to and from the Marine Base. No change was made in the written contract.

There was also evidence that the distant location of the Marine Base project, the hours of work and the inadequacy of public transportation facilities all combined to make it essential, as a practical matter, that the employer furnish

transportation in some manner if employees were to be obtained for the job. This was not a case of employees traveling in the same city between home and work. Extended cross-country transportation was necessary. And it was transportation of a type that an employer might fairly be expected to furnish. Such evidence illustrates the setting in which the contract was drawn.

The Court of Appeals felt, however, that the original contract to furnish transportation was not followed and that a new oral contract to pay transportation expenses was substituted in its place. We need not decide whether that view is justified by the record. It is enough that there is sufficient evidence to support the Deputy Commissioner's view that the payment of transportation costs was merely one way of carrying out the original contract obligation to furnish the transportation itself.

We therefore hold that, under the particular circumstances of this case, the Deputy Commissioner was justified in concluding that Ticer's injury and death arose out of and in the course of his employment. And since the Deputy Commissioner had jurisdiction over this case, the resulting award of compensation should have been sustained.

Reversed.

MR. JUSTICE FRANKFURTER concurs in the result.

MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent.